114-265

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 223.

THE BOATMEN'S SAVINGS BANK, PLAINTIFF IN ERROR,

vs.

THE STATE SAVINGS ASSOCIATION OF ST. LOUIS.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

FILED JUNE 16, 1882.

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INDEX.

	Original.	Print.
Writ of error	*a*	1
Return to writ of error	*c*	1
Citation	*d*	2
Proof of service	*e*	2
Transcript from circuit court of St. Louis	1	2
Petition	1	2
Amended answer	3	4
Replication	9	7
Judgment	9	7
Motion to set aside judgment filed	10	7
Order overruling motions to set aside judgment	10	8
Bill of exceptions	10	8
Check of Cobb, Dolhonde & Co. to Henry Ames & Co., Oct. 23, 1874	11	8
Check of Cobb, Dolhonde & Co. to bearer, Sept. 5, 1874	11	9
Testimony of Joseph M. Pettis	11	9
R. J. Lackland	22	16
C. S. Greeley	29	20
W. A. Clendenin	35	24
Charles Parsons	37	25

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	Original.	Print.
Testimony of J. R. Shepley	41	27
Plaintiff's instructions	51	33
Defendant's instructions	51	34
Motion for new trial	56	36
Allowance of appeal	57	37
Affidavit for appeal	58	37
Bond for appeal	58	38
Clerk's certificate	59	39
Assignment of errors	60	39
Judgment	61	40
Opinion	62	40
Bond	70	44
Clerk's certificate	72	45

a UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United of America, to the honorable judges of the St. Louis court of appeals of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said St. Louis court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State Savings Association of St. Louis, plaintiff, and The Boatmen's Savings Bank, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
b of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said defendant as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighteenth day of January, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by me to operate as a supersedeas.

SAM. F. MILLER,
Associate Justice Sup. Court U. S.

c STATE OF MISSOURI, *ss:*

I, Joseph F. Baier, clerk of the St. Louis court of appeals, in obedience to the mandate of the within writ, herewith transmit to the Honorable Supreme Court of the United States a full, true, and complete transcript of the record and proceedings in the within-

entitled cause as fully as the same remain of record and on file in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court, at office, in the said city of St. Louis, this 8th day of February, A. D. 1882.

[SEAL.] JOS. F. BAIER, *Clerk.*

d The United States of America to the State Savings Association of St. Louis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the St. Louis court of appeals of the State of Missouri, wherein The Boatmen's Savings Bank is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States, this eighteenth day of January, in the year of our Lord one thousand eight hundred and eighty-two.

SAM. F. MILLER.

e We hereby acknowledge service of this, the within citation, at St. Louis, Missouri, this the twenty-first day of January, 1882, for plaintiff, herein, defendant in error.

GLOVER & SHEPLEY,
Att'ys for State Savings Association.

[Endorsed:] State Savings Ass. *vs.* Boatmen's Savings Bank. Citation on writ of error to U. S. Sup. C'r't.

1 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the 15th day of February, A. D. 1881, there was filed in the office of the clerk of the Saint Louis court of appeals a transcript from the circuit court, city of St. Louis, in the words and figures following, to wit:

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Be it remembered that heretofore, to wit, on the 14th day of August, A. D. 1878, there was filed in the office of clerk of the circuit court, city of St. Louis, a petition, which is in the words and figures as follows, to wit:

Petition.

In the Circuit Court, City of St. Louis.

STATE OF MISSOURI, *ss:*

STATE SAVINGS ASSOCIATION OF ST. LOUIS
against
BOATMEN'S SAVINGS BANK.

The plaintiff, a corporation, states that on and after the fifth day

of September, 1874, the defendant was a banking corporation doing business in the city of St. Louis, and receiving deposits of money from those who chose to deposit with it, and from thenceforth continued to be such banking corporation.

Plaintiff further states that then there existed a certain firm doing business under the name and style of Cobb, Dolhonde & Co.; that on the twenty-third day of October, 1874, the said firm of Cobb, Dolhonde & Co. drew their certain check upon the said Boatmen's Saving Bank of that date, herewith filed, whereby the said Cobb, Dolhonde & Co. ordered and directed the said defendant to pay
2 to the order of certain persons, by the name and description of Henry Ames & Co., the sum of six hundred and twenty-three dollars and forty-two cents, which check the said Henry Ames & Co. then and there endorsed and delivered to the said plaintiff; that on or about the fifth day of November, 1874, the said plaintiff presented said check above described to the said defendant and demanded payment thereof to said plaintiff of said defendant; that on the day of the date of the check above mentioned the said Cobb, Dolhonde & Co. had deposits of money belonging to them with said bank to a much larger amount than said check and all others drawn by them against it, and on or about the fifth day of November, 1874, and at the time payment of the same was demanded by said plaintiff of defendant, said Cobb, Dolhonde & Co. had on deposit with defendant a much larger amount of money than the amount of said check, but defendant at the time of the presentation of said check to it by plaintiff refused to pay the same, and has ever since neglected and refused to pay the amount thereof to plaintiff.

Plaintiff states that by reason of the drawing of said check, the endorsement thereof to plaintiff, and said presentation and demand, the said defendant became liable to pay said amount of said check to said plaintiff, and for which amount of 623.42 dollars, together with interest thereon, said plaintiff asks judgment.

And for a further cause of action the said plaintiff states that said persons, doing business under the firm and style of Cobb, Dolhonde & Co., on the fifth day of September, 1874, drew their other check upon said Boatmen's Savings Bank of that date, herewith filed, whereby the said Cobb, Dolhonde & Co. ordered and directed the said defendant to pay to the order of bearer thirty-three
3 dollars. That said check came into the hands of certain persons doing business under the name and style of Laville, Warner & Co., and said Laville, Warner & Co. endorsed and delivered the same to plaintiff; that on or about the 5th day of November, 1874, the said plaintiff presented said last-named check to said defendant and demanded payment by the defendant to said plaintiff of the amount thereof; that on the said day last mentioned, & as the time of said demand by said plaintiff, the said Cobb, Dolhonde & Co. had deposited with defendant a much larger amount of money than the amount of said check, but defendant then and there refused to pay to said plaintiff the amount of said check, and has ever since, & does now, refuse to pay to said plaintiff the amount so specified therein.

Plaintiffs ask judgment for the amount in said check specified, together with interest thereon from the time of said demand.

GLOVER & SHEPLEY,
Att'ys for Pl'ff.

And afterwards, to wit, on the 5th day of November, A. D. 1879, the defendant, by leave of court, filed the following amended answer:

Amended Answer.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

In the Circuit Court of the City of St. Louis. Room 5.

STATE SAVING ASSOCIATION OF ST. LOUIS, Plaintiff, }
vs. } No. 47106.
THE BOATMEN'S SAVINGS BANK, Defendant. }

By leave of court first had the defendant files this its
4 amended answer herein.

Defendant denies each and every allegation in said petition, and the several counts or statements thereof contained, save as hereinafter admitted: and for a further defense to each of said several causes of action defendant states that it was before and at the several dates in said petition mentioned, and has since continued to be, a banking corporation, as alleged, at the city of St. Louis, and the plaintiff was at the same time, and has since continued to be, also another banking corporation at the same place; that at the several times stated as the dates of said several checks, and daily afterwards and hitherto, the plaintiff and defendant were carrying on this business, demanding from debtors, receiving and paying out money in large amounts, and severally meeting all legal demands made against them without exception.

That on October 3, 1874, one W. S. Bartley drew his certain bill of exchange to his own order on Cobb, Dolhonde & Co., at New Orleans, Louisiana, at 40 days, for the sum of $3,172.75, and afterward, to wit, on the day of the date thereof, duly endorsed and assigned the same for value received to the defendant, and said Cobb, Dolhonde & Co. afterward, to wit, on the day last aforesaid, duly accepted the same in writing on the face thereof, and thereby became liable and promised to pay the amount of said bill to defendant at the day the same became payable.

That while defendant was the holder and owner of said bill of exchange, and before the maturity thereof, said Cobb, Dolhonde & Co. failed and suspended payment; that is to say, on or about the 31st day of October, A. D. 1874, and on the date last aforesaid,
5 and before said check was presented, notified defendant in writing of said failure and suspension; that by said notice and writing defendant was given to understand, and did understand, and was instructed, no further payment was to be made by said Cobb, Dolhonde & Co., nor by said defendant, out of any funds then

or thereafter held by it on account of any checks by said firm drawn on said defendant.

And, further defending, defendant says that after said suspension said Cobb, Dolhonde & Co. did never resume payment, but eventually were adjudicated bankrupts, and declared as such, as heretofore stated.

That at about the time and before said suspension the said several checks in said petition mentioned and described were presented by the then holders of the same to the plaintiff as if the same were, respectively, drawn upon the plaintiff, and the plaintiff did then and there, and before said suspension, and voluntarily, and not at the request of said Cobb, Dolhonde & Co., nor with any purpose to buy or purchase said checks, or either of them, or to have the same negotiated or assigned to plaintiff, pay and cancel the said checks, and did charge the several amounts thereof to the said Cobb, Dolhonde & Co. without any condition whatever.

And, further defending, defendant says that after said suspension and failure and said notification thereof to defendant, as aforesaid, the plaintiff, defendant admits, did present said several cancelled checks to defendant and demand payment thereof, and defendant did then and there refuse to pay the same severally; and defendant says it was not then, nor hath it ever been, liable to pay the same to plaintiff.

That thereupon plaintiff, pretending it had some legal claim
6 on defendant on said several checks, which defendant denied, and that plaintiff and defendant might consult persons learned in the law of and about the differences existing between them, and that the same might be settled without litigation, at the request of plaintiff defendant drew its certain cashier's check, dated November 5th, 1874, in favor of John R. Shepley or order for the sum of $656.42, the same being the amount of said two checks, and delivered the same to said Shepley, who was then and there the agent and attorney of the plaintiff, and acting for it and by its authority in all this business; and it was then and there understood and agreed by and between said plaintiff and defendant that said cashier's check should be held by said Shepley, and said cancelled checks, dated, respectively, September 5th, 1874, and October 23rd, 1874, and now sued on, should be held by defendant to await further advice and determination of the parties by their attorneys as to their claims and liabilities in the premises; and if said draft held by defendant on said *said* Cobb, Dolhonde & Co., then growing due, was not paid at maturity, and said defendant should demand back said cashier's check, then said Shepley should enclose and deliver back said cashier's check to defendant, and defendant should return said check of Cobb, Dolhonde & Co. to plaintiff, and plaintiff thereupon would make no further demand against defendant on account of said checks of Cobb, Dolhonde & Co., or either of them.

That said acceptance of Cobb, Delhonde & Co. was not paid at maturity, nor at any time, nor to any amount other than as hereinafter stated; that upon the maturity and non-payment of said bill

of exchange defendant notified said Shepley and plaintiff that
7 same was not paid, and requested a return of said cashier's check, which said Shepley was then bound, as aforesaid, to redeliver, but did delay therein until May 5th, 1875, when he did, pursuant to said agreement, return said cashier's check to defendant, duly endorsed, and defendant did return to him for the plaintiff said cancelled checks of said Cobb, Dolhonde & Co. now sued on; that on the — day of ——, A. D. —, a petition in bankruptcy was filed in the United States district court in and for the district of Louisiana, at New Orleans, and such proceedings were had therein; that said Cobb, Dolhonde & Co., and each of the members thereof, were, on the — day of ——. A. D. —, adjudicated bankrupt under the laws of said United States relating to bankrupts.

That from and after the non-payment of said bill of exchange, and notice thereof to plaintiff, and demand for and return of said cashier's check or claim, plaintiff made no further demand against defendant for or on account of said cancelled checks, but as it was understood and agreed between defendant and plaintiff, as aforesaid, it should do, did abandon and desist from any further claim on account or because thereof; and defendant did rely upon the said understanding and agreement, and induced thereby and by the course of conduct pursued by plaintiff toward the defendant in the premises, did credit its said acceptance then matured and held by plaintiff against said Cobb, Dolholde & Co., with the full amount of both said cancelled checks, that is to say, the sum of $656.42; and did thereupon present and prove up its demand against the estate of said bankrupts in said United States district courts in bankruptcy for the balance only, and no more of said acceptance, after de-
8 ducting said credit; and that said claim was allowed and adjudged payable by said court against said estate for said balance only. That but for the said credit given, as aforesaid, the whole of said acceptance could have been proven, and would have been allowed against said estate in bankruptcy. That such proceedings were afterward had in said bankruptcy court that certain dividends were allowed and paid on said demand of defendant, to the amount of $262.96, being — per centum on said claim as allowed, and nothing was allowed for the balance of said acceptance to defendant because said balance had been, was and is absolutely cancelled by said credits made and applied, as aforesaid.

That said Cobb, Dolhonde & Co., were afterward by said United States district court duly discharged in bankruptcy.

And defendant says that by means of the premises plaintiff should not be received or allowed to allege anything on either of said checks sued on, or to recover aught for or on account of any of the matters by plaintiff in its said petition set forth; and that plaintiff is estopped by reason of the premises in this answer stated, to assert either of its pretended claims against the defendant; and defendant asks to be hence dismissed, with its costs in this behalf most wrongfully sustained.

A. M. GARDNER AND
NOBLE & ORRICK,
Att'ys for Def't.

And afterward, to wit, on the the 7th day of November, A. D. 1879, the plaintiff filed the following replication, to wit:

9 *Replication.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court.

The State Savings Association, Plaintiff,
vs.
The Boatmen's Savings Bank, Defendant.

And now comes the plaintiff, and for reply to the new matter set up in defendant's amended answer, denies each and every allegation and statement as set forth and mentioned in the said amended answer.

GLOVER & SHEPLEY,
Att'ys for Plaintiff.

Judgment.

And afterwards, to wit, at the October term, A. D. 1880, of said court, the following proceedings were had in this cause, to wit:

MONDAY, *November 8th*, 1880.

State Savings Association of St. Louis
vs.
Boatmen's Savings Bank. } (47106.)

Now at this day come said parties, by their respective attorneys, and this cause coming on for hearing, waiving a jury, submit this cause to the court upon the evidence and proof adduced; and the court having heard the same, and being fully advised of and concerning the premises, doth find the issues joined herein on the first count of the petition in favor of said plaintiff, and assesses its damages at the sum of eight hundred and forty-eight dollars and seventeen cents; and doth find the issues herein joined on the second count of said petition in favor of the plaintiff, and assesses its damages at the sum of forty-four dollars and ninety-nine cents.
10 It is therefore considered by the court that the plaintiff recover of said defendant the sum of eight hundred and ninety-three dollars and sixteen cents, being the total amount of the damages assessed as aforesaid, and also its costs and charges herein expended, and have execution therefor. Instructions filed.

Mo. to Set Aside Judg't, &c., Filed.

WEDNESDAY, *November 10th*, 1880.

State Savings Association of St. Louis
vs.
Boatmen's Savings Bank. } (47106.)

Motion of defendant to set aside judgment filed.

Mo. to Set Aside Judg't, &c., Overruled.

MONDAY, *November* 15*th*, 1880.

State Savings Association of St. Louis
vs.
Boatmen's Savings Bank. } (47106.)

It is ordered by the court that the motion of defendant to set aside judgment and for new trial submitted herein be overruled.

Bill of Ex. Filed.

THURSDAY, *November* 18*th*, 1880.

State Savings Association of St. Louis
vs.
Boatmen's Savings Bank. } (47106.)

Defendant's bill of exceptions presented, allowed, signed, sealed, and filed.

Which bill of exceptions is in the words and figures following, to wit:

Bill of Ex.

In the Circuit Court of the City of St. Louis. October Term, 1880.

OCTOBER 11TH, 1880.

State Savings Association of St. Louis, Plaintiff,
vs.
Boatmen's Savings Bank, Defendant.

Appearances: For the plaintiff, Mess. Glover & Shepley; for the defendant, Mess. Noble & Orrick and A. M. Gardner, Esq.

11 Be it remembered that the above-entitled cause came on for a hearing upon the 11th day of October, 1880, at the October term, 1880, on the issues made before His Honor Amos M. Thayer, judge of said circuit court of the city of St. Louis, without a jury, a jury trial being waived, when the following proceedings were had:

The pleadings were read, and to sustain the issues on part of the plaintiff to be sustained, counsel for plaintiff read the two checks in suit as follows, the genuineness of all signatures thereto and thereon being admitted.

But objection on other grounds reserved, and same not now being offered in evidence, but read only:

No. 102. ST. LOUIS, MO., *October* 23*rd*, 1874.

Boatmen's Savings Bank pay to the order of Henry Ames & Co., six hundred and twenty-three dollars and $\frac{42}{100}$ C. F. D.'s.

COBB, DOLHONDE & CO.

Endorsed: Henry Ames & Co., per G. A. Wiggeman.

No. 34. ST. LOUIS, MO., *September 5th*, 1874.

Boatmen's Savings Bank pay to the order of bearer thirty-three dollars, C. F. D.'s.

COBB, DOLHONDE & CO.

Endorsed: Laveille, Warner & Co.

Testimony of J. M. Pettis.

JOSEPH M. PETTIS, sworn on the part of the plaintiff, testified as follows:

Direct examination by J. R. SHEPLEY, Esq.:

Q. Mr. Pettis, what position did you occupy in 1874 in the State Savings Association, if any.

A. Individual book-keeper.

Q. Did you ever see those checks before? (Set out above handed to witness.)

A. Yes, sir.

12 Q. State what you know about them.

Counsel for defendant objects to the question as too general, and says that defendant does not deny the signature to those checks to be that of Cobb, Dolhonde & Co.; does not deny the face of the checks, and does not deny the endorsement, but believes them to be genuine, as is admitted.

Q. Do you know anything about the presentation of those checks to the Boatmen's Savings Bank.

A. I presented them myself.

Q. What time?

A. October 31st, 1874.

Q. How did you present them on the 31st of October, 1874?

Q. What was done upon presentation?

A. I presented them. I first went to see Mr. Lackland and asked him, telling him that our bank had cashed those checks; that they were not drawn on us, and asked him if he wouldn't pay them. Mr. Lackland told me that he didn't think they had the money. I told him I knew they did have the money, because I had just come from their office and Forrester Dolhonde (Mr. Dolhonde's son, the man who drew these checks) told me that if these checks had been cashed by the State Savings, that they had more than enough in the Boatmen's to meet the checks; and then Mr. Lackland said that they held paper of that house that was to mature in the South, and declined to pay them.

Q. Declined to pay them?

A. These two checks.

Q. Did you see Mr. Thompson, the cashier?

A. No; I think I spoke only to Mr. Lackland. I don't remember speaking to Mr. Thompson.

13 Q. Did you present them at the counter before seeing Mr. Lackland?

A. No.

Q. If anything, what makes you certain about the date this presentation was made? You say you presented them on the 31st day of October, 1874; why do you say that?

A. From a copy of a letter I have seen.

Q. Received by you?

A. Not received by me; received by the State Savings.

Q. You say this was done at the Boatmen's Savings Bank?

A. Yes, sir.

Q. What relation had Mr. Lackland to that bank, if any?

A. He was the president of it.

Q. About what time of day was it?

A. I think it was between—it was before noon.

Q. In banking hours?

A. Yes, sir; between half past nine and half past ten.

Q. Do you know anything else about this presentation except what I have asked you about; did you make it again?

A. No.

Q. Did you make any presentation other than you have stated?

A. No.

Q. Did Mr. Lackland refuse to pay those checks?

A. Yes, sir.

Q. Did he give you any reason for it?

A. He said that they held paper of theirs that was to mature in the South.

Q. Who held?

A. That the bank held paper of theirs that was to mature in the South; that that bank—the Boatmen's—held paper of Cobb, Dolhonde & Co. that was to mature.

Q. He didn't pretend he held any paper that had already matured of Cobb, Dolhonde & Co.?

A. I don't think he did; I don't remember of his saying so.

Mr. SHEPLEY: Now, I propose to ask him in reference to
14 the appearance of those checks. I will offer in evidence the checks; that is the best way to raise that question.

Mr. NOBLE: I want to ask some questions before that is done.

Q. By Mr. NOBLE: What is your situation at the State Savings?

A. Individual book-keeper.

Q. You are not paying teller?

A. No.

Q. Never have been?

A. No.

Q. You are individual book-keeper, and that is all the position you have ever occupied in that bank?

A. Yes, sir.

Q. You are related to Mr. Parsons, the president?

A. Yes, sir.

Q. Where is the letter you received upon which you say you acted?

A. I said it was a copy of a letter, a copy of a letter Mr. Parsons had that I refreshed my memory from.

Q. When did you refresh your memory as to the time when you went to the Boatmen's Savings Bank?

A. I saw that letter this morning.

Q. Is it a fact that your statement here as to your action at the time is based simply on a copy of a letter that has been shown you this morning?

A. Yes, sir.

Q. Do you know when Cobb, Dolhonde & Co. announced their suspension of payment in the city of St. Louis?

A. I do not.

Q. You know they did, don't you?

A. Yes, sir; they did do it.

Q. And don't you remember the fact to be, or do you, that it was upon the announcement of that suspension that you, as book-keeper, began to look into the accounts of Cobb, Dolhonde & Co.?

A. No. The suspension was not announced up to that time publicly.

Q. When did you begin to look into the accounts of Cobb, Dolhonde & Co. in your bank?

A. October 31st, 1874.

15 Q. How long was it before your arrived at a conclusion in regard to their accounts?

A. His errors?

Q. No; in regard to their account with your bank; whether it was for or against.

A. How long?

Q. Yes.

A. It would not take but a few minutes.

Q. Now, then, on that account, did you find that they were overdrawn or underdrawn?

A. I found they were overdrawn.

Q. When did you begin to examine into how that happened?

A. October 31st, 1874.

Q. What did you do in that regard?

A. I collected all of their checks together for examination. I saw these two were drawn on the Boatmen's and cashed by us; that made the overdraft.

Q. What time of day did you do that?

A. It was between nine and ten in the morning.

Q. Sir?

A. Some time between nine and eleven; I couldn't remember exactly; it was in the forenoon.

Q. How do you fix that day?

A. I say I saw a copy of that letter.

Q. Have you any remembrance as a matter of absolute fact outside of reference to a letter as to what day it was in the month?

A. No.

Q. You have not?

A. No; I have not.

Q. Where did you find Mr. Lackland?

A. I found him in his office.

Q. In the bank?

A. In the bank.

Q. Why didn't you go to the usual place to present your check?

A. I don't know.

Q. What was the matter with your check; you didn't expect it to be paid at the teller's desk?

A. I went to Mr. Lackland to explain the thing; it is a very frequent occurrence between banks these errors.

Q. I asked you whether there was anything the matter with
16 that check more than ordinary that prevented you going to the teller's desk to get it paid?

A. Simply from the fact they had failed I thought that teller might not pay it, and I wanted to see Mr. Lackland to explain the case to him how the check came into our possession.

Q. Was not the check cancelled on its face?

A. The check was cancelled; yes.

Q. At what time?

A. Yes; cancelled because we had paid it.

Q. You had paid it, and when you paid it you had charged it to Cobb, Delhonde & Co.'s account?

A. Yes, sir.

Q. How long had they been overdrawn at your bank?

A. Just after those check had been paid.

Q. You had received an announcement that morning from Cobb, Delhonde & Co. that they had suspended, hadn't you?

A. Yes, sir.

Q. You had?

A. Yes, sir.

Q. And Mr. Lackland had received an announcement to that effect; when you arrived he knew they had suspended?

A. I don't know what Mr. Lackland knew.

Q. Didn't you tell him they had suspended?

A. I told him so; yes, sir.

Q. And he knew it; he didn't express any surprise at it, did he?

A. I don't remember that part of it.

Q. What was the condition of these checks, as far as marks of cancellation were concerned, at the time you took them to the Boatmen's Savings Bank; point out to his honor?

A. This cancellation is a stamp used by the State Savings.

Q. These little dots?

A. No.

Q. There in the middle which tear the paper?

A. Yes, sir.

17 Q. What are these off to the right—these little *fleur de lis?*

A. Those are not used by us.

Q. Who are they used by?

A. Those (indicating) last are not used by us, but the big tearing in the center is.

Q. What is the fact in regard to the custom of banks and the practice of banks upon the payment of checks as to putting such marks as that upon the check when they pay it?

A. It is simply put on here to show the check has been paid, and to assist the teller in case it is ever presented again by any one.

Q. I mean here (indicating the tearing in the center).

A. The check being defaced, this would attract the teller's attention, and it would not be paid. The cancelling is done to prevent the check being paid by the same bank again on whom it is drawn.

Q. In other words, it is a mark that the check has been paid already?

Ans. Yes, sir.

Q. What is the date of this check?

A. September 5th, the $33 one; October 23rd, 1874, the check for $623.42.

Q. When those checks were paid they were credited, I presume, in your bank, to somebody, were they not, and charged to Cobb, Dolhonde & Co.?

A. Yes, sir.

Q. Who were they credited to?

A. One was credited to Ames & Co., and the other one to Lavielle, Warner & Co.

Q. When you charged that to Cobb, Dolhonde & Co., and credited Ames & Co. in the one instance, and Laveille, Warner & Co. in the other, your books were balanced, were they not, on that basis, as far as these checks were concerned?

A. Yes, sir.

Q. And so remained for all the time between the payment of the checks by your bank and the time whenever it may have been that you presented them to the Boatmen's Savings; at all events, that long?

A. These checks made the overdraft.

18 Q. I understand; but your books were balanced, so far as charges on the books were concerned, on the basis you have mentioned when you presented the checks to the Boatmen's?

A. Yes; we have a debiting and crediting.

Q. As far as the debit and credit is concerned?

A. Yes, sir.

Q. Cobb, Dolhonde & Co., on the face of your books at the time when you presented these checks to the Boatmen's Savings Bank, were in your debt on account to the amount of those checks?

A. Yes, sir.

Q. But they were indebted on open account?

A. Yes, sir.

Q. Had you anything to do with the reception of those checks from the bank?

A. Only to charge them up.

Q. Who paid them?

A. The teller.

Q. What individual paid them?

A. No individual paid them; they were credited——

Q. I mean what teller?

A. The receiving teller.

Q. Who was that?

A. The receiving teller of the State Savings Association credited these different parties with these two checks.

Q. And cancelled them?

A. Yes, sir.

Q. And when they came into your hands as book-keeper you made the proper entries as being drawn on your bank?

A. Yes, sir.

Q. I see it stated in this petition, Mr. Pettis, that on or about the 5th of November, 1874, plaintiff presented the checks for payment to the Boatmen's Savings Bank on or about the 5th of November. Now, what occurred in regard to these checks, so far as you know, on the 5th of November, anywise different than what occurred on the 31st of October, as to presentation; do you know of anything?

A. No, sir.

19 Q. Did anything happen to your knowledge after the day, whatever it may have been, you say you went to the Boatmen's Bank in regard to the presentation of these checks?

A. I don't remember of anything.

Q. There was but one transaction of that kind, be the day whatever it may in point of time?

A. That is all I recollect of.

Q. Do you know of any one else ever attempting to present those checks at the Boatmen's?

A. I do not.

Q. Did you ever present those checks for payment at the paying teller's desk of the Boatmen's Savings Bank?

A. I did not.

Q. How long did you say it took you to go over the account of Cobb, Dolhonde & Co. at your bank?

A. But a few minutes; 15 minutes may be.

Mr. NOBLE: I have no more questions.

Q. By Mr. SHEPLEY: Mr. Pettis, when did those checks come into your possession, if ever, first?

A. This one of six hundred——

Mr. SHEPLEY: Did you have them at any time before you took them from the bank to present them to the defendant? Who did the cancellation of them?

A. I did.

Q. When?

A. The $632.42 check was done on the 24th of October. I don't remember when the other was.

Q. How did you come to do it, and why?

A. The checks that they used were, if my memory serves me right, similar, simply with the change of the name in the body of the check, and——

Mr. NOBLE: I make this objection, that there is no such claim as that made, that those checks were cancelled by mistake. There is no such issue in the case.

20 Mr. SHEPLEY: No such issue because, if cancelled by mistake, they are just as good as they ever were.

Mr. NOBLE: I make the objection for incompetency & irrelevancy.

THE COURT (to the witness): I overrule the objection; you may answer the question.

And to the action of the court in this behalf, in then and there overruling defendant's said objection, defendant, by its counsel, then & there excepted.

A. The checks being similar, and I not seeing they were drawn on the Boatmen's, and Cobb, Dolhonde & Co. keeping an account with both banks, and they having numerous checks every day, supposing these were drawn on the State Savings, I charged them up.

Q. And cancelled them?

A. And cancelled them.

Q. It was on account of supposing they were drawn on your own bank?

A. Yes, sir.

Q. When did you first discover the mistake?

A. October 31st, 1874.

Q. That was the first time your attention was drawn to it?

A. Yes, sir.

Q. How was your attention drawn to it?

A. Hearing of the failure. Mr. Parsons came to me and asked me how they stood on our books. I told him they were overdrawn to the amount of those two checks. Then I got all of Cobb, Dolhonde & Co.'s checks together, and, upon examination I found these two checks making the overdraft should have been paid by the Boatmen's.

Q. The mistake, then, was yours, on account of the similarity of the design of the check?

A. Yes, sir.

The plaintiff, by counsel, offered now to read the checks in evidence.

21 Defendants, by counsel objected, unless the whole checks go in just as they stand.

The COURT: I shall have to admit the check.

And to the action of the court in overruling said objection & admitting said evidence the defendant, by counsel, then and there excepted, and for incompetency and irrelevancy.

The checks, as heretofore set forth, was then read in evidence.

Mr. SHEPLEY: We close here for the present.

And plaintiff here rested its case; and this was all the evidence introduced by plaintiff in chief.

And thereupon defendant asked the court to give the written instruction following:

"The court declares the law to be that on the testimony and evidence introduced the plaintiff is not entitled to recover in this action, and the finding must be for the defendant."

An the court refused to grant or declare said instruction; and to

the action of the court in refusing said instruction the defendant, by its counsel, then and there excepted.

And thereupon, and to support the issues on part of defendant to be supported, the defendant introduced the following witnesses & evidence:

Testimony for the Defense.

It was admitted at this trial by counsel, without proof, first, that at the time the particular checks were presented in the manner testified to by Mr. Pettis, whenever they were presented, there was owned & held by The Boatmen's Savings Bank, defendant, the particular draft and acceptance described in defendant's answer, being
the draft of one W. S. Bartley upon Cobb, Dolhonde & Co.,
22 dated October 3rd, 1874, at 40 days, and due November 15th, 1874, on which was the acceptance of Cobb, Dolhonde & Co., as the time for the sum of $3,172.75; also that Cobb, Delhonde & Co. had suspended payment, in point of fact, on or before the 31st day of October, 1874; that they were subsequently adjudicated bankrupt in the city of New Orleans, in the district court of the United States in and for that district, on the 23rd day of March, 1875, on petition in bankruptcy filed January 8th, 1875; also that credit was given by defendant after the maturity of Bartley's draft on the acceptance of Cobb, Dolhonde & Co., to the amount of the balance on open account in their favor with defendant, and that defendant proved up in bankruptcy only the difference between said acceptance and said credit so given against the estate of said bankrupts; that the credit was for the whole amount of the balance, $688.42; also, defendant got dividends only on said balance. It *is* was also admitted at this trial, by the the parties, that the State's Savings Association presented a claim as creditor against said Cobb, Dolhonde & Co. to the amount of $3,377.65, and received as dividend thereon $753.99. It was also admitted defendant on its balance got dividend July 8th, 1875, $225.59, and on July 31st, 1876, a dividend of $37.50, and no more; that Cobb, Dolhonde & Co. were subsequently discharged in bankruptcy in due course of proceedings in the United States court.

Mr. SHEPLEY: As far as that is concerned, we interpose objections as to relevancy; that is a matter we will argue.

Testimony of R. J. Lackland.

23 R. J. LACKLAND, sworn on the part of the defendant, gave testimony, in substance as follows:

On direct examination:

Witness was president of the Boatmen's Savings Bank, and was at the date of these transactions, and had seen the papers dated October 31st, 1874, Cobb, Dolhonde & Co. to the Boatmen's Savings Bank of St. Louis, and that from his knowledge of Cobb, Dolhonde & Co.'s writing is in Mr. F. Dolhonde's writing, and was thus received at defendant's bank on the 31st day of October, 1874.

The paper was read in evidence as follows:

OCTOBER 31ST, 1874.

Boatmen's Savings Bank, St. Louis.

GENTLEMEN: We regret to advise you we are compelled to suspend. This we are aware will be very unexpected to you, and until very recently we ourselves had no apprehension of such a necessity, but the heavy losses we have sustained in the recent shrinkage in the prices of provisions, holding as we did large stocks, and other losses, is the cause. This and our New Orleans house will very shortly make a statement of their conditions, and until then we ask your indulgence.

Respectfully,

COBB, DOLHONDE & CO.,
By F. DOLHONDE.

Witness continued: That it was his impression Mr. Pettis didn't bring these checks to the defendant's bank for two or three days after the announcement of the failure. But the defendant had received the letter before Mr. Pettis came to the defendant's
24 bank with the check. Mr. Pettis was there; whenever he may have been there it was after witness had received this letter; after the failure Mr. Pettis brought those checks down to witness and wanted us to pay them, which witness refused. Mr. Parsons saw him, witness, once; he came down to the bank; witness thinks he saw him afterwards on the same subject, and some days after that Mr. Greeley came, and he had a conversation with Mr. Parsons; Mr. Greeley was one of the trustees of the State Savings Association. As witness understood, he was a director of defendant; Mr. Greeley came to me and said he had had a conversation with Mr. Parsons in regard to this matter, and Mr. Parsons was very anxious that we should take up those checks and issue a cashier's check in favor of Mr. Shepley; to have us issue a cashier's check and take up those checks and charge them upon our books; that Mr. Shepley was very busy; he wanted time to look into the matter; another thing was that probably Bartley's acceptance might be paid; if so, Mr. Shepley was to hand that cashier's check to the State Savings, and if it was not paid he was to return it to us; there the matter stood for six months; we did that—gave him a check; the check will show for itself; the matter stood in that way; we never received anything, of course, from Bartley; the parties went into bankruptcy. After the matter had remained some six months, which the date will show when it was returned, I went to Mr. Shepley with those checks, cancelled checks, and told him I would take our cashier's checks. He handed me our cashier's check and endorsed it, and he said he had no claim against us; the matter was ended. This is the check; it is dated the 5th of November.
25 They failed on the 31st of October. This is the check endorsed; this is the memorandum made by Mr. Thompson at the time, after the check was delivered; witness thinks Mr. Shepley brought down the cancelled check and we issued that check to him, as witness understood it, if we collected our claim.

Mr. GLOVER: Please give the words used by Mr. Shepley and yourself.

If the acceptance was paid this check must be handed to the State Savings. If it was not paid he was to return it to us. The Boatmen's check, the cashier's check—that check—it was so drawn to Mr. Shepley's order; when it was returned it was pursuant to that agreement. After this statement to you and the surrender of this check by Mr. Shepley, we gave Cobb, Dolhonde & Co., on their acceptance, credit with that and a small balance which was on the books, I think amounting to $688, some thirty odd dollars more than two checks, and proved the balance up in bankruptcy; there were no other items than the acceptance, less the credit; we got the check back from Mr. Shepley about six months after it was delivered to him. Witness thinks he had not any conversation with Mr. Shepley in the meantime.

Q. Did you learn from Mr. Parsons or Mr. Shepley, acting in this transaction, whether there was any question of law then mooted as to your liability on these checks of Cobb, Dolhonde & Co.?

A. I don't recollect of hearing any question of law spoken of by Mr. Parsons or Mr. Shepley; we looked upon Bartley, the drawer of the draft accepted by Cobb, Dolhonde, & Co., as weak, amounting to nothing; the credit was given originally on Cobb, Dolhonde & Co.'s acceptance. The utmost good feeling existed between
26 the State Savings Association and ourselves, and does yet, and we desired no controversy. Mr. Greeley being a friend of both parties, a particular friend of Mr. Parsons, he suggested the transaction mentioned, and I acquiesced in it; we saw no harm that would come from it, and we were willing to save them; we did it cheerfully, more from serving them than ourselves. If Bartley paid the draft of course we lost nothing, and we had no objection to accommodating them; we had no other motive; of course we could have taken high ground and said "we won't issue our cashier's check;" we didn't choose to do that.

On cross-examination by Mr. SHEPLEY for plaintiff:

A. I might have said something.

Objecting to any composition with Cobb, Dolhonde & Co., there might have been a remote possibility of recovering something from Bartley. I never had much confidence in getting anything out of him. I knew at the time he was a myth. I might have said something like refusing; we never give up without trying to get it, however poor a man may be; something might turn up; I may have said "No." My own convictions was Bartley was not worth a cent, and never was. Yes, sir; my conviction is very strong. I so regarded him about November 5th; we took the paper upon the strength of Cobb, Dolhonde & Co., and not Bartley. I think I had no conversation with Mr. Shepley, except when he brought those checks down himself and got the cashier's check. I recollect only what I have stated; that cashier's check was put in Shepley's hand, and if Bartley paid his draft he was to return the check to the State Savings, and if it was not

paid the check was to be returned to me, as I have already
27 stated; we received from Shepley then the two checks. And when Shepley gave up to us the cashier's check and the Boatmen's Savings we delivered to Shepley the two checks of Cobb, Dolhonde & Co. upon the Boatmen's Savings Bank. We were exactly as we were before. Defendant had got back its check and Shepley had got the two checks that he held of the State Savings Association on the Boatmen's Bank. Witness returned to Shepley the Cobb, Dolhonde & Co. checks because they were the same checks you handed to me. The understanding was we were to return to Shepley the checks, and they were delivered up upon Shepley's delivering witness the cashier's check.

Q. Did you then make any representations to me about whether you had received anything upon the draft drawn by Bartley upon Cobb, Dolhonde & Co., in order to convince me I ought to give up that check?

A. I suppose Mr. Shepley was posted on the subject whether defendant had received anything on Bartley's draft. He would not have delivered the check unless he was satisfied he should give it up. I told him we had received nothing, and I would take the check. He, Shepley, handed the check, and said: "We have no claim against you; here is your check." I stated to him we had received nothing. Of course he would not have returned the cashier's check unless he was satisfied we had not.

By Mr. SHEPLEY:

Q. Can you state with any certainty, Mr. Lackland, at this time, what I said there in reference to the delivering up of the check; are you certain at all I said "We have no claim against you"?

A. Yes; I am very certain of it. I am certain you never would have delivered the check if there had been any chance.

28 Q. Do you mean to say I said "We have no claim against you on this check of the Boatmen's Bank—the cashier's check"?

A. I understood you to say you had no claim upon the Boatmen's Savings Bank arising out of that transaction, as evidence of that you delivered the check and endorsed it.

Q. The obligation that I was surrendering was an obligation of the Boatmen's Savings Bank to me, was it not—an obligation given to me?

A. Yes, sir.

Q. At the time when I said I had no claim I was talking about whether upon that check I had any claim upon the Boatmen's Savings Bank, wasn't I?

A. You were talking as attorney of the State Saving Association, and not as John R. Shepley.

Q. How do you know how I was talking; can you be certain about it?

A. I am certain you were attorney of the bank, and I was very certain you were talking in your capacity as lawyer for the institution.

Q. What we are talking about was the surrender of the check payable to me, was it not, individually?

A. Yes, sir. Well, sir, that was put in your hands for that purpose.

Q. Why did you return to me the Boatmen's check, the checks upon the Boatmen's Bank of Cobb, Delhonde & Co., upon my surrender to you of the cashier's check?

A. It was according to the agreement and understanding.

Q. That was according to the agreement and understanding?

A. Yes, sir.

Q. You agreed, then, I should get the checks back drawn by Cobb, Dolhonde & Co. upon the Boatmen's Bank at the time I surrendered the Boatmen's check payable to me?

A. Yes, sir; the identical checks were returned.

29 Q. Part of the original agreement was they were to be returned?

A. Yes, sir.

Q. If the Boatmen's got back this check?

A. These identical checks were to be returned to you, which was done.

Q. You brought the checks up to my office and got it there, didn't you?

A. Yes, sir.

Q. Did you have in your hands the two checks drawn by Cobb, Dolhonde & Co. on the Boatmen's Bank when you came up to my office?

A. Yes, sir.

Q. And you then got from me the cashier's check payable to me, and I declined the other two checks?

A. Exactly; and took the cashier's check to your order; you turned it over and endorsed it, and there it is; the whole transaction explains itself.

Also—

Testimony of C. S. Greely.

CARLOS S. GREELY, sworn on the part of the defendant, testified as follows:

On direct examination by Mr. NOBLE:

Witness is a citizen of St. Louis and the person referred to by the last witness.

Q. Going back to the period of these transactions, in October and November, 1874, please state what was your position in connection with the State Savings Association at that time. In October & November witness was one of the trustees of State Savings Association and a director in the Boatmen's Savings Bank, & was on very friendly terms, intimate, with Mr. Parsons and Mr. Lackland, the presidents of plaintiff & defendant; of almost daily intercourse, frequent, 1874?

A. On or about the 31st October, 1874, witness was in the State Savings [Association] when Mr. Parsons spoke to me in regard to

these checks of Cobb, Dolhonde & Co. He seemed to think
30 that the Boatman's Bank ought to pay them. Witness had a contrary view, and he proposed that we should—as Mr. Shepley was their attorney—that we should issue a cashier's check for these two checks, and Mr. Shepley was to hold the check to see whether the draft which was held by the Boatmen's [Bank] was paid, and was, according to recollection of witness, to see whether they had any legal claim upon the Boatmen's Bank. That arrangement was carried out. I went down and told Mr. Lackland what Mr. Parsons proposed, and I recommended that it be done, and it was done.

On cross-examination by Mr. SHEPLEY, counsel for plaintiff:

I never was a director of the State Savings Association, but one of three visitors. As to the language that was made use of between Mr. Parsons and witness at that time, witness recollects pretty distinctly of Mr. Parsons speaking to witness in regard to the checks and of this proposition, which was acceptable. Mr. Parsons remarked that perhaps our draft might be paid in New Orleans, and that these checks should be put in your, Mr. Shepley's, hands, to be held by you until the maturity of the draft—this draft that was to mature in New Orleans; that was what I recommended to our bank, to issue the check and place it in your hands, and you was to hold it until this matter was determined. I recollect one remark Mr. Parsons made was, "It is possible that that draft may be paid." I remarked I hadn't the remotest idea it would be paid, and he said possibly it might be paid. I recollect that remark he made. I
31 don't recollect anything being said of any arbitration. I don't recollect of any such conversation by anybody.

Q. Then, according to your statement, as I now apprehend it, Mr. Parsons was urging you to get them to give this cashier's check to me upon the ground tha the wanted to have the benefit of seeing whether that draft was paid at maturity by the drawer?

A. That was one of the grounds.

Q. Was there any other ground?

A. According to the best of my recollection; of course I cannot give the precise words of anything that occurred six years ago; I can give the impression made upon my mind, that is, as far as I could state in regard to it, that you being an attorney and considered a fair lawyer, that he was willing for the matter to be left in your hands, and for you to inquire into it, as to the rights of the institution upon the Boatmen's Bank; that is the impression upon my mind.

Q. That is the impression that is now left on your mind?

A. Yes, sir; of course I cannot quote the words.

Q. Can you state with any degree of certainty such was really said by Mr. Parsons?

A. I am pretty positive he manifested a willingness to do the very thing which I have just stated.

Q. Is it your idea the Boatmen's was to assent to my passing upon or to ascertain and arbitrate between the Boatmen's and the State Savings?

A. I understood it to be thus, if you, as attorney of the State Savings, decided that they had no legal claim upon the Boatmen's, that ended it, and the check would be returned that is the impression made upon my mind at the time.

Q. But suppose I did come to a determination — they *they* had a perfectly good cause of action, what then, would the Boatmen's pay?

32 A. You had the check returned to you, which was the agreement; you were to hold this cashier's check.

Q. If I came to one determination the State Savings was to surrender, and if I came to the other that the Boatmen's was liable, what then?

A. You had the cashier's check.

Q. As you state it, it was rather a one-sided affair; was anything said that that was to be returned if you didn't realize the amount of your draft?

A. The check was to held by you until the matter was determined, and, as I said before, I understood if the draft was paid the matter was settled; if it was not paid it was right for the State Savings to collect the check from the Boatmen's Bank.

Q. Was anything said about what should be done with the two Dolhonde checks?

A. I don't recollect anything being said in regard to that; not in my presence at the bank; I am not sure that I was present when the cashier's check was issued; I recollect going down and speaking to Mr. Lackland and telling him what proposition was made by Mr. Parsons.

Q. As I understand you, this was a conversation which took place between you and Mr. Parsons in reference to getting your assistance in carrying out some arrangement?

A. I reviewed it in a sort of amicable way to fix the thing up and not to have any trouble about it.

WITNESS continues: I am not sure whether I was present or not when this check was given to you.

Witness does not know how long after this conversation between him and Mr. Parsons this check was given to Mr. Shepley.

33 Q. You don't know anything about whether there was an agreement that the checks were to be returned upon the surrender by me of the cashier's checks?

A. The understanding was the checks were to be returned upon the surrender by Mr. Shepley of the cashier's check, the time when I spoke to Mr. Lackland; I think you were present.

Q. Mr. Glover and myself vary about what was just stated; you say that you understood it was part of the agreement which was proposed by Mr. Parsons to be entered into that upon my return of the cashier's check on the non-payment of the Bartley draft the checks of Cobb, Dolhonde & Co., upon the Boatmen's Bank, the cancelled checks were to be returned to me?

A. That was my understanding.

Q. Do you know why these checks were to be returned me, the Dolhonde checks?

A. I don't know any reason that was given, only that was the understanding that those checks there should be returned, as has been done.

On re-examination:

Recollection of witness is that he was in the State Savings, and Mr. Parsons spoke to him in regard to these checks; and, according to witness' recollection, he suggested this course in regard to Mr. Shepley being anxious to have the matter settled amicably, without any trouble, witness went down and told Mr. Lackland the proposition, and recommended that it be carried out. That is the whole matter as near as witness can recollect. It was with a view of having no trouble or hard feelings or litigation in regard to the matter. I could not give the exact — I saw Mr. Shepley; it was just about that time; it may have been the same day. Witness could not say as to that; witness can't say whether he called on Shepley or
34 whether he met him on the street or in the Boatmen's; impression is he was at the Boatmen's at the time this matter was carried out; that is impression of witness.

Q. On whose behalf was he then acting?

Objected to.

Q. Do you know who he was acting for at that time?

Objected to, on the ground that witness should not give his opinion.

Objection sustained.

And to the action of the court in this behalf in sustaining said objections, defendant, by its counsel, then and there duly excepted.

Witness continues: Mr. Shepley at that time came down to the bank. Witness don't know whether we was present at the time the cashier's check was issued.

Witness don't know whether he had Cobb, Dolhonde & Co.'s checks with him at that time; he had charge of them; as witness understood he had them; don't know that of his own knowledge; could not say that witness was present when the cashier's check was issued.

Q. What did Mr. Parsons say in regard to Mr. Shepley and his connection with the bank, if anything, in the conversation with you?

A. Mr. Parsons remarked in regard to Mr. Shepley & his connection with the banks that he was a fair man and a good lawyer; witness don't recollect Mr. Parsons said anything in particular in regard to the attorneyship of the bank; witness thinks Mr. Shepley was one of the attorneys of the State's Savings Association at the time; that is impression of witness. Witness don't recollect any conversation that took place there on the part of Mr. Shepley at
35 defendant's bank. Mr. Shepley was acting in the capacity designated by Mr. Parsons, in which we acquiesced, to hold this check, this cashier's check, and in regard to inquiring into the question of the Boatmen's liability is my impression of the matter, now tha the was acting for the State Savings. (It was then admitted

in this matter that the check dated St. Louis, November 5th, 1874, Boatmen's Saving's Bank, pay to John R. Shepley or order six hundred and fifty-six dollars and $\frac{42}{100}$, signed by Mr. Thompson, cashier, and certified by Mr. Busch, teller, was issued on that day to John R. Shepley, and by him subsequently endorsed, and is now held by the defendant, and is marked on its face "Paid' May 5th, 1875," being the same paper referred to by Mr. Lackland in his testimony.)

And thereupon defendant rested his case.

And thereupon to further sustain the issues on its part, and in *in* rebuttal of the defendant's evidence the plaintiff introduced and offered the following:

Testimony in Rebuttal.

Testimony of W. A. Clendenin.

W. A. Clendenin, sworn on the part of the plaintiff, testified as follows:

Examined by Mr. Shepley:

This book is the individual ledger, A to K, of the defendant, and witness reads therefrom:

Upon the account of Cobb, Dolhonde & Co. "two checks numbered 34 and 102, for $33 and $623.42, presented, and payment refused, after failure of C., D. and Co." This is written upon
36 the account of Cobb, Dolhonde and Co., "but now paid to John R. Shepley by our cashier's check No. 2087, which he is to hold for benefit of State's Saving Association in the event of our not demanding same of him for our own use." Then it says in a little bracket, see credit below, "then book" not balanced, but account current made out and sent to C., D. & Co. April 10, 1875. See letter, checks with letter C., 1874, waiting usual book balancing," Then another note, see charge above our cashier's check returned to us by J. R. Shepley on delivery to him of C., D. & Co's two checks above referred to.

On cross-examination by Mr. Noble:

This check of Mr. Shepley is No. 2087; this credit below was given May 5th, 1874. The cashier's check should be issued November 5th, 1874; on the 5th of May the credit, $656.42, balanced the account precisely, making the footing on the debt and credit side $1,344.84; the amount due Cobb, Dolhonde & Co. on that account originally, before these transactions occurred, $688 and some cents stood to their credit until April 10; there was a charge of that $688 April 10th, 1875 of the same amount; there was a charge to them made April 10, 1875, $688.42; this is a copy of the account as it appears on the defendant's book:

37 *Folio* 358. *Copy of Ac. on Ledger "A to K."*

Cobb, Dolhonde & Co., in account with Boatmen's Savings Bank.

Dr.		Cr.	
1874.		1874.	
From "357"	39,534 97	From "357"	41,195 85
Oct. 10.	50 00	Oct. 14.	578 46
12.	85 00	16.	500 00
13.	22 00	19.	1,763 28
14.	376 50		
15.	228 50		
16.	1,964 55		
17.	124 00		
19.	74 00		
22.	200 00		
23.	400 00		
24.	1,000 00		
26.	125 00		
27.	50 00		
28.	14 65		
To balance	688 42		
	44,037 59		44,037 59
Nov. 5. To c'f.	656 42	Nov. 1. By balance	688 42
1875.		1875.	
Ap'l 10.	688 42	May 5.	656 42

See charge above.

[Indorsed in red ink on the credit side.]

$34, $33, presented and payment refused after the failure of C., D. & Co., but now paid to John R. Shepley by our cashier, C. K., No. 2087, which he is to hold for benefit of State Sav. Asso., in event of our not demanding same of him for our own use.

Book not balanced, but ac. current made out and sent to C., D. & Co., Ap'l 10, '75, (see letter); check with letter "C," 1874, awaiting usual book balancing.

Our cashier's check, 2057, returned to us by John R. Shepley, on delivery (see charge above) to him of C., D. & Co.'s two checks above referred to.

Testimony of Chas. Parsons.

Charles Parsons, sworn on the part of the plaintiff, testified as follows:

On direct examination by Mr. Shepley:

In 1874, witness' official character in regard to the State Savings was president. Witness first saw these checks on the 31st day of October, 1874. I called on the book-keeper to know how the account of Cobb, Dolhonde & Co. stood; he told me it appeared to be overdrawn between six and seven hundred dollars, I believe. I told him

to get up the checks; he immediately got up the checks in a very few minutes, and found there were two checks in our hands that had
38 been drawn on the Boatmen's Savings, and had been by mistake charged up to the account of Cobb, Dolhonde & Co. with us, which created the overdraft. I then told him to take those checks to the Boatmen's Savings, and see if they would pay them, which he did; he returned, saying they declined to pay them. Then I had afterwards some conversation with Mr. Greely and, I think, with Mr. Lackland. Then, I think, I talked with Mr. Lackland about a certain compromise that was proposed; they offered 25 per cent. I don't recollect when that was. Mr. Lackland thought he would get something more out of Bartley. They offered 25 per cent., 12 and a half cash and the balance on time.

Defendant objects to this testimony as to compromise, because the same is of matters in compromise, & incompetent & irrelevant; & the court overruled the objection; & such action of the court in this behalf, the defendant, by its counsel, then and there excepted:

In regard to any check placed in Mr. Shepley's hands, witness don't recollect having any conversation with Mr. Lackland about anything of the kind; probably had a conversation with Mr. Greely; thinks he had a conversation with Mr. Lackland about the debt, but thinks not about placing check in Shepley's hands; thinks Mr. Greely had that conversation. There was a conversation with Mr. Greely in regard to the solvency of Bartley, and the possibility that portion of the debt might be got, and perhaps the whole paper paid by Bartley, and if Bartley wouldn't pay the whole paper he might insist on the Boatmen's crediting up the balance they had on the books, if it stood so. Whereupon I
39 suggested to Mr. Greely that the Boatmen's give its check or pay the money or something of that kind, and we would refund it provided they didn't collect it from Bartley; I didn't know Bartley; I got the impression from some source he was a responsible party; it was supposed he was a responsible party, or responsible for something; and it would be a better position for both banks to have this balance liquidated on their books until we could find out whether Bartley was going to pay or not in case the paper went to protest—which we expected it would. And it was understood that this cashier's check, or money, or whatever the Boatmen's delivered over should be placed in the hands of Mr. Shepley and the checks we held on the Boatmen's delivered to the Boatmen's, and if Bartley was insolvent, if nothing was made out of him, these checks were to be handed back to us—to Mr. Shepley for us—and that Boatmen's cashier's check was to be returned to the Boatmen's, and that we should stand just as we stood before. That was the whole object of the conversation, and that is all there was about it that I know of or ever heard of until recently. I never attempted to do any arbitration about the matter. I gave the paper to Mr. Shepley to be sued on. I never gave any other instructions about it, except in regard to this temporary arrangement to see if anything could be got out of Bartley; about that I instructed him to receive

this certificate of deposit and hold it until they were satisfied—the Boatmen's were satisfied. They were not going to make anything out of Bartley; when they become satisfied they could not, to return the cashier's check; I instructed him to take this cashier's
40 check and give them the two checks drawn by Cobb, Dolhonde & Co. upon the Boatmen's; the checks to be held by them until they were satisfied whether or no they would get anything out of Bartley, and to return the cashier's check—the Boatmen's cashier's check—to them when they demanded it, and to receive in return the checks we held against the Boatmen's. I gave him no other instructions at all.

Q. I will ask you whether those are marks used in your bank (indicating)?

A. These three marks (*fleur de lis*) are not used at all by us; we do not use any such stamp as that at all; they were not put on by the State Savings. I do not know whom they were put on by. Mr. Lackland may know; they are not ours at all. I think they were not on when I gave the checks to Mr. Shepley.

On cross-examination by Mr. NOBLE, counsel for defendant:

Witness does not remember when he did commence this suit. The suit was not commenced for quite a long time. I am aware of that. Mr. Shepley was acting as attorney in this case; he acted as attorney sometimes, and you (Noble) acted sometimes. In regard to this case he was our attorney, our sole attorney; we have no special attorney, our attorneys act as we choose to engage them. At the time I spoke to Mr. Shepley and he got this check—this cashier's check—he was acting as our attorney in this matter undoubtedly.

Testimony of J. R. Shepley.

Also, JOHN R. SHEPLEY, sworn on the part of the plaintiff, testified as follows:

On direct examination by Mr. GLOVER, counsel for plaintiff:

41 Q. Did you have in your hands prior to the time of the reception by you of the cashier's check of the Boatmen's Savings Bank, previously testified about, these two checks of Cobb, Dolhonde & Co. upon the Boatmen's Savings Bank; and, if so, what time and for what purpose?

A. These two checks were put into my hands, as a member of the firm of Glover & Shepley, on or shortly after the 31st of October, for the purpose of bringing suit on by the State Savings Association. Some time afterward, and before any steps were taken, upon a statement made to me by Mr. Parsons, I prepared an agreement between—as I understood from the statement I understood him to make—between the State Savings Association and the Boatmen's Savings Bank, embodying what I supposed to be an agreement entered into between the two banks. I went down to the Boatmen's Savings Bank to see about it, having drawn up the agreement between the two parties as I understood it. I found, however, that I

was mistaken as to the arrangement in one particular—that the check, as I understood it, was to be given by the Boatmen's bank to the State Savings Association, and I had so written the instrument. While down there I had a conversation with Mr. Lackland, and he set me right as to what was a misunderstanding on my part in regard to whom the check was to be payable. I had drawn the instrument that the check was to be made payable to the State Savings Association, and it was to be by them returned. Mr. Lackland gave me to understand that that was not the agreement; that it was to be payable to me. I then would have had to alter the instrument, but he said there was no necessity for that. He
42 said: You take the check, made payable to you, and if we receive the amount of this draft that we have drawn by Bartley upon Cobb, Dolhonde and Co. when it matures, then you are to * * * hold the check and give it to the State Savings Association. If it turns out our draft is unpaid, then you are to return it to us. And it was agreed at the same time that I was to deliver to them, and they were to enter in their account of Cobb, Dolhonde and Co., the amount of these checks as being paid; and that if afterwards things turned out differently, they would charge back these checks and return the checks to me, I to return to them at the same time their cashier's check. Afterwards, some time in the spring, Mr. Lackland came to me and told me that nothing had been paid on that draft of Bartley, and that Cobb, Dolhonde and Co. were in debt to them greatly above the amount of this check, and requested me to return the check to the Boatmen's Savings Bank, in accordance with the agreement. I said, "Very well; I shall see Mr. Parsons." I don't know, I am not positive, whether I asked Mr. Parsons if that was so; I think it highly probable. I at once gave up to Mr. Lackland the check. But, at any rate, if I did anything it was merely to satisfy myself, from conversation with Mr. Parsons, that nothing had been realized on that draft; that it was proper for me to give up the check to the Boatmen's Savings Bank. So about the time stated in the amended answer I did give up to Mr. Lackland the cashier's check which had been made to my order, having previously endorsed it in blank. When I received it it had no endorsement; it was an ordinary cashier's check, payable to my
43 order. I endorsed it in blank and handed it to Mr. Lackland; at the same time he handed to me the two cancelled checks drawn by Cobb, Dolhonde and Co. upon the Boatmen's Savings Bank.

Q. State what instructions Mr. Parsons gave you in regard to that matter.

A. The first instructions were to commence suit upon it, and then afterwards he instructed me what arrangement had been entered into between the State Savings and the Boatmen's Bank; I embodied that in what I supposed to be an agreement; I found out afterwards that I was mistaken in regard to whom the check was to be made payable, or it may be afterwards the Boatmen's concluded it was better and safer for them to make the check to me, to some third person, rather than the State Savings Association; I am not positive how

that was, whether it was an afterthought of theirs or whether they said that was the original agreement—that it was to be made payable to me.

Q. Had you any authority other than what you have mentioned?

A. None at all; I carried out what I supposed to be the agreement between them; I made no agreement myself, nor pretended to make any.

Q. Do you recollect what you said to Mr. Lackland when you returned the check and he gave you the Delhonde check?

A. No, sir; I don't recollect what language I used; if I made use of the language Mr. Lackland thinks I made use of, it had reference alone to the check payable to me—that I had no further claim upon that check.

Q. Do you remember anything about the language?

A. I don't; I don't remember the slightest thing about it.

44 Q. Were you instructed at any time to determine the liabilities of the parties and definitely settle it?

A. No; never at any time; it never entered into my comprehension; I had no authority to enter into any such agreement; I certainly would not have entered into such an agreement unless I had specific authority.

Q. In regard to the return to you of the two Dolhonde checks, was anything said about those checks at the time of the return by Mr. Lackland to you?

A. Not that I remember; I have not the slightest recollection, except when I gave him back the cashier's check of the Boatmen's Savings Bank he just handed to me the two checks of Cobb, Dolhonde & Co. upon the Boatmen's Savings Bank; I have no recollection of anything passing between us at the time.

Q. Will you state any conversation you had with Mr. Greely upon this?

A. It is impossible; Mr. Greely might have been present at the Boatmen's Saving Bank when I had the conversation with Mr. Lackland; I have no recollection; if I went there at the time the board was sitting it is probable, and perhaps very possible, he did have some conversation; I made no statement such as stated here to any

———.

On cross-examination by Mr. NOBLE, counsel for defendant:

Q. You heard Mr. Greely's statement that he met you on the street, or in your office, or somewhere, in regard to this matter, and spoke to you about it; do you mean to say no such * * * occurrence took place?

A. I understood Mr. Greely in his statement to refer only to

45 his being present at the Boatmen's Savings Bank; I didn't understand him to say that he had a conversation with me on the street, or in my office, or anywhere else; I have no recollection of any conversation with Mr. Greely, unless some conversation might have taken place at the time I had the conversation with Mr. Lackland.

Q. Mr. Shepley, wasn't your attention as a lawyer at this time

brought to the consideration of the question whether the holder of a check could recover on the check against the bank if the bank refused payment?

A. Yes, sir; upon the bringing of the checks to me, Mr. Glover and myself had a conversation about it then.

Q. I don't ask, unless you choose to state it, what your conversations, either with your partner or client, were, but I want to get at the state of this case as far as I can. Now, your mind being upon that question, did you not inquire into—as a legal proposition—the authorities then existing in regard to it?

A. Yes, sir.

Q. Did you not find at that time, among other decisions, that of the Supreme Court of the United States in 10th Wallace?

A. Yes, sir.

Q. And did you not consider that was a decision against the power of the State Saving's, the plaintiff in this case, to recover against this defendant in an action of this nature?

A. As to that there was quite a discussion between Mr. Glover and myself. He undertook to say——

Q. Never mind. I ask what you thought. Didn't you consider that that was an authority against your ability to recover?

A. I thought it was very possible that the courts of Missouri would consider that was to some extent an authority, which would have more effect upon them than the authorities the other way. We
46 looked up the authorities and made up our mind.

Q. You did consider that the then existing authority was a decision against you on the proposition that you could recover on the check?

A. Well, if I could——

Mr. NOBLE: That is a plain proposition.

A. There is no difficulty about it.

Q. Will you please answer, yes or no, whether you considered the case of Millard, in 10th Wallace, was not a case in point and against you?

A. I will state in relation to that it was a matter of discussion between Mr. Glover and myself as to how far that would control the the case. Mr. Glover thought one way and I thought the other.

Q. I am not asking what Mr. Glover thought. I am asking what you thought?

[A.] I thought the probability was the supreme court of the State would take the view of the Supreme Court of the United States, and then came up the question whether—assuming that to be so—whether that met this case, even if they did take that view.

Q. Now, having given your own answer in your own way, will you answer my question, whether or not you considered that 10th Wallace case of Millard a case in point and against you, yes or no?

A. I don't know that I can answer as to that. I considered that the probabilities were that the Supreme Court would consider not only that was a case at law alone, but that it went so far as to hold that taking it as an equitable assignment they would hold it was a

case in point of deciding the law, as far as the Supreme Court of the United States could decide it in regard to equitable assignment also.

Q. Do you consider this is any other thing than an action at law?

A. I don't know that I am going into that question. I am not here to decide that.

47 Q. You are a witness and you have been agent; I am not putting this question to you in the spirit of inquiring into your professional opinion. I want to know what you, as agent, then thought in regard to the rights of your client?

A. I thought it was a doubtful; that is all I did. I thought it was one of those questions in which the Supreme Court of the United States had decided one way and the supreme court of the State had decided another.

Q. Did you consider at the time, or did you not, that the claim that this plaintiff had against this defendant was anything more than such a claim as would be enforced as an action at law as distinguished from a suit in equity?

A. I didn't think anything about it; I was not considering that question.

Q. Then, if there was no such distinction as that then existing as what you say you did consider the Supreme Court at that time had decided in an action at law against your claim?

A. Yes, sir; as an action at law I looked at that case in 10th Wallace, and I came to a decision, and I do so think to-day about that.

Q. How long was it after the case was in this condition before you did actually commence suit against this defendant?

A. I think it was some time after the decision in the case of McGrade against the German Savings Bank in court of appeals.

Q. And was it not because of that decision you brought the action?

A. Undoubtedly that influenced me, the State Savings Association had instructed me prior to that time—had instructed me to bring suit and test it.

Q. They had done that prior to the time of that agreement?

A. And after I had received the cancelled checks.

48 Q. Now, then, the fact is as I understand your statement, that the decision of the Supreme Court of the United States being against you as an action at law, and you having this claim of the defendant in your hands, you did not proceed to bring an action for the space of some three years, and did not until after the court of appeals had decided, as you supposed, in favor of such an action?

A. Yes, sir.

Q. That is a fact?

A. Yes, sir; that is a fact.

Q. You then were of the opinion, were you not, whether professionally or individually, at the time that Mr. Lackland called upon you for the purpose of raising his cashier's check, that you could not maintain an action against him at law under the existing decision of the court?

A. I didn't have any such idea; I thought it was one of those

vexed questions which could not only be decided by going to the Supreme Court.

Q. Why didn't you bring an action?

[A.] Simply because—like anything else—I said to my client as to that for this 8625 you have got to go to the Supreme Court, and the costs are large.

Q. Would you ordinarily delay your client for three years simply because the question was doubtful, without bringing suit when the defendant had taken the position, and said he would not pay?

A. I don't know as that has *that has* anything to do with this particular case.

Q. Was there any circumstance to your knowledge in connection with this transaction that biased your judgment or prevented your action, anything in the transaction between the parties?

A. None at all that I know of; I considered myself at liberty to bring suit the next day after I received the check, if I chose.

49 Q. You didn't do it?

A. No.

Q. Didn't you know the draft, the acceptance, of Cobb, Dolhonde & Co. matured the 14th of November, 1874?

A. If my recollection is right, I didn't know exactly the time, unless it was stated to me and I put it down in the agreement that I wrote. I don't recollect whether I did or not; I presume I did know, or I might if I had recollected.

Q. Didn't you make any inquiry from the time the acceptance matured on the 14th of November, 1874, through the months of November and December and January and February and March, as to the condition?

A. None at all.

Q. Were you not interested in making inquiry, as attorney of the State Savings?

A. No, sir; I considered it was the duty of the State Savings to look after that; not mine at all.

Q. You were not interested in getting them their money on this check, payable to your order, and putting it in their possession, if the facts warranted it?

A. Perhaps in excessive vigilance for their interests I might. I supposed they had a great deal more interest than I had, and would look after that matter and advise me.

Q. Would you consider it ordinarily, as an attorney, acting for a bank, an excessive amount of vigilance in the matter to have made an inquiry whether a certain condition upon which your check was to be paid had happened within at least four months?

A. Certainly not. I supposed the State Savings, knowing all about those things, would advise themselves about that matter. I thought also that they thought it might yet be paid. I supposed that was a matter they were negotiating themselves. I gave myself no trouble about it, because I knew the State Savings would attend to the matter.

50 Q. You have heard the statement of Mr. Greeley, made here, in regard to that question being put, and the liability of this defendant being under consideration?

A. Yes, sir.

Q. In the conversation?

A. Yes, sir.

Q. Did you never have any such question as that presented to you, directly or indirectly, in connection with this claim, either by your client or the defendant?

A. What?

Q. As to the liability of this defendant to pay in any event on the checks which it had refused to accept?

A. As I told you, that was the very thing that was brought to me originally to sue on.

Q. Then it was up?

A. Of course.

Q. I will ask you another question: Had you, at the time I have referred to, and in regard to which I asked you questions about the decision of the Supreme Court of the United States on this question, read the article in the second volume of the American Law Register, or, if you had read it, was it present in your mind, being a criticism on the reasons given by the court of South Carolina for holding a bank liable where they had refused to accept the check?

A. No.

Q. You took it at that time?

A. I don't recollect what time it was published. If I saw it I presume it had escaped my mind. I hadn't it at that time.

Q. It was published in the year 1868?

A. I had forgotten it; it was long before this; 11 years before this occurred. I very likely didn't read it at the time.

Mr. NOBLE: We have no further testimony.

And the foregoing was all the testimony introduced or offered by either party, and case was here closed.

And thereupon the plaintiff moved the court to give the
51 instructions and declarations following:

Plaintiff's Instructions Given.

No. 1. If the court find that the check given in evidence by plaintiff were cancelled by mistake, then such cancellation will not prevent a recovery in this action.

No. 2. Unless the parties to this suit agreed to submit to John R. Shepley the question of the liability of defendant to plaintiff on the checks in evidence, and that said Shepley did decide that there was no liability on the part of defendant to plaintiff for said checks, then the defendant have made out no defence to this action.

No. 3. If the court find from the evidence that the cuttings and marks upon the checks given in evidence by plaintiff were made by mistake and inadvertence by the clerk of plaintiff, said clerk believing at the time that said checks were drawn upon the plaintiff, then said cuttings and marks in no way effect said checks or either of them.

To each of which instructions the defendant, by its counsel, then

& there objected, as same were offered, and the court overruled the defendant's several objections and granted said instructions, and the defendant, by its counsel, to the action of the court in overruling defendant's objection, and in granting said several instructions, and as the same were severally granted, did then and there except at the time.

And at the same time the defendant moved the court to give the instructions and declarations following, numbered two (2), three (3), four (4), five (5), and seven (7):

Defendant's Instructions Refused.

STATE SAVINGS ASSOCIATION, Plaintiff,

vs.

THE BOATMEN'S SAVINGS BANK, Defendant.

52 Instructions asked at the close of the whole case by defendant.

No. 2. If the court finds from the evidence that defendant refused payment of each of the checks described in the petition on presentation and demand, then this action cannot be maintained by plaintiff against the defendant, and the finding must be for the defendant.

STATE SAVINGS ASSOCIATION, Plaintiff,

vs.

THE BOATMEN'S SAVINGS BANK, Defendant.

Instructions asked at the close of the whole case by defendant.

No. 3. The court declares that if, before either of the checks described in plaintiff's petition was presented by the plaintiff to the defendant and payment thereon demanded, the drawers had notified the defendants that they had suspended payment, then the plaintiff cannot recover in this action.

STATE SAVINGS ASSOCIATION, Plaintiff,

vs.

THE BOATMEN'S SAVINGS BANK, Defendant.

Instructions asked at the close of the whole case.

If the court finds from the evidence that each of the checks described in the petition were first presented to the plaintiff and the amount thereof paid or credited to the holder, and the checks then and there cancelled by the plaintiff, and the amount thereof charged as a debit to the drawers on their open account with plaintiff on the books of the plaintiff, then it is declared such action of plaintiff
53 was a payment of such checks, and this action cannot be maintained by plaintiff against defendant thereon or because of the possession thereof.

STATE SAVINGS ASSOCIATION, Plaintiff,
vs.
THE BOATMEN'S SAVINGS BANK, Defendant.

Instructions asked at the close of the whole case by defendant.

If the court finds from the evidence that each of the checks described in the petition were first presented to the plaintiff and the amount thereof paid or credited to the holder and the check then and there cancelled by the plaintiff and the amount thereof charged as a debit to the drawers on their open account with plaintiff on the books of the plaintiff, and that while such check still bore the evidence of its cancellation on its face and said debit to the drawers on plaintiff's books still remained, the plaintiff presented the checks to defendant and demanded payment, then it is declared the defendant was not bound to pay same, and the finding must be for the defendant.

STATE SAVINGS ASSOCIATION, Plaintiff,
vs.
THE BOATMEN'S SAVINGS BANK, Defendant.

Instructions asked at the close of the whole case by defendant.

No. 7. If the court finds from the evidence that upon the presentation by plaintiff of the checks in question and refusal by defendant to pay same the defendant claimed the right to apply the deposit
54 of Cobb, Dolhonde & Co. in the defendant's bank on the Bartley draft accepted by Cobb, Dolhonde & Co., and soon to become due, the said Cobb, Dolhonde & Co. then having suspended payment, as the parties knew, and thereupon, at the request of plaintiff, the defendant issued its cashier's check to J. R. Shepley for the amount of the checks in question, with the understanding had between the parties at the time that if said draft and acceptance was not paid in due time the cashier's check should be returned by Mr. Shepley to defendant and the checks in question to plaintiff, that said draft and acceptance was not so paid and on request the said cashier's check was returned by Mr. Shepley, with the consent of plaintiff, to defendant, who then and there returned to Mr. Shepley for plaintiff the checks in question, and it was known to the plaintiff and said Shepley that defendant's object was to apply the amount of deposit of Cobb, Dolhonde & Co. equal to said cashier's check as set off on said unpaid draft and acceptance, and said defendant did proceed to apply the amount aforesaid in part payment of said acceptance and the acceptors having been adjudicated bankrupts proved up the defendant's claim for only the balance of said acceptance, and thereon only received dividends, and said bankrupts have been duly discharged, and plaintiff did not again assert its claim on the check in question against defendant until this suit was brought, then the court declares the plaintiff acquiesced in the appropriation of the said deposits by defendant under its claim at the time, and cannot maintain this action.

And to each of which said instructions as the same were offered

the plaintiff, by its counsel, then and there objected, and the
55 court sustained the objections and refused said instructions severally. And to the action of the court in refusing said instructions, & as each was refused, the defendant then and there accepted at the time.

And the court granted the following instructions on motion of defendant:

Def't Inst. Given.

STATE SAVINGS ASSOCIATION, Plaintiff,
vs.
THE BOATMEN'S SAVINGS BANK, Defendant.

Instructions asked at the close of the whole case by defendant.

No. 6. If the court finds from the evidence that after the presentation by plaintiff of the checks in question and refusal of defendant to pay same, it was agreed between the parties to issue to J. R. Shepley the cashier's check of defendant for the amount of checks in question, and hold said checks in question, with the understanding that said Shepley should inquire as to the legal liability of defendant, and also await the event of payment or non-payment of the Bartley draft on its maturity, and if said draft was not paid and said Shepley determined the defendant was not liable on the checks in question, he should return to defendant its cashier's check, receiving back said check in question, and the plaintiff should abandon all claim against defendant, that said draft was not paid in due time, and said Shepley on request did return the cashier's check and declare to defendant he had no claim on it and that the matter was ended, then the court declares the plaintiff cannot recover in this action, and the finding must be for defendant.

56 And the court, desiring to be further advised, did take the said cause under advisement, and having duly considered the same, afterwards, to wit, on the 8th day of November, A. D. 1880, did find the issues for the plaintiff and assess the damages on the first cause of action at $848.17, and on the second cause of action at $44.99, & renders judgment thereon accordingly against defendant, and thereupon within four days of said judgment, that is to say, on November 10th, 1880, the defendant did file its motion for a new trial in words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of the City of St. Louis, in the State of Missouri. October Term, 1880.

THE STATE SAVINGS ASSOCIATION, Plaintiff,
vs.
THE BOATMEN'S SAVINGS BANK, Defendant. } (No. 47106.)

Now comes the defendant and moves the court to set aside the finding and judgment entered and grant a new trial in this cause for the reasons:

1. The finding is against the evidence introduced at the trial.
2. The finding is against the weight of the evidence.
3. The court erred in refusing instruction numbered 1 asked by the defendant at the close of the plaintiff's case in chief.
4. The finding and judgment are against the law as declared in the instructions given by the court.
5. The finding and judgment are against the law applicable to the case.
6. The court erred in refusing to give instructions numbered 2, 3, 4, 5, and 7 by the defendant at the close of the case.
7. The court erred in giving instructions numbered 1, 2, and 3 asked by the plaintiff.
8. The damages assessed are excessive.

57 9. The court admitted illegal testimony offered by the plaintiff against objections of the defendant.

10. The court rejected legal testimony offered by defendant, on objection of plaintiff & of its own motion.

NOBLE & ORRICK,
Att'ys for Defendant.

And afterwards, to wit, on November 15th, 1880, the court having duly considered said motion, did overrule the same, & to the action of the court in this behalf in overruling said motion the defendant by its counsel did at the time then and there except. And now, inasmuch as the matters and things herein may not otherwise appear of record in the cause the defendant tenders his bill of exceptions, and asks that the same may be allowed and made a part of the record herein, & the same is accordingly done.

AMOS M. THAYER, *Judge.* [SEAL.]

And afterwards, to wit, at the October term, A. D. 1880, of said court, the following further proceedings were had in this cause, to wit:

STATE SAVINGS ASSOCIATION OF ST LOUIS
vs. } 47106.
THE BOATMEN'S SAVINGS BANK.

FRIDAY, *November 19th*, 1880.

Now comes defendant by attorney and files herein and affidavit for appeal, and on motion an appeal is hereby granted said defendant to the Saint Louis court of appeals from the judgment rendered herein. Bond approved and filed.

Which affidavit and bond are in words and figures following, to wit:

58 STATE OF MISSOURI } *ss:*
City of St. Louis, }

Rufus J. Lackland, president of the Boatmen's Savings Bank, the above-named defendant, being duly sworn, makes oath and says that the appeal prayed for in the above-entitled cause is not made

for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

RUFUS J. LACKLAND.

Sworn to and subscribed before me, this 19 day of Nov., A. D. 1880.

CHAS. F. VOGEL, *Clk.*

Know all men by these presents, that we, Boatmen's Savings Bank as principal, and Rufus J. Lackland & Abraham M. Gardner as sureties, are firmly bound unto State Savings Association of St. Louis in the sum of eighteen hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at St. Louis, this 19th day of November, A. D. 1880. The condition of the above obligation is such, that whereas the Boatmen's Savings Bank has appealed from the judgment rendered against it and in favor of the State Savings Association of St. Louis in the circuit court, city of St. Louis, for the sum of eight hundred & ninety-three dollars and sixteen cents, together with costs: Now if said appellant shallprosecute its appeal with due diligence to a decision in the St. Louis court of appeals,

59 and shall perform such judgment as shall be given by the St. Louis court of appeals, or such as the St. Louis court of appeals may direct the circuit court, city of St. Louis, to give, and, if the judgment or any part thereof be affirmed, will comply with and perform the same, so far as it may be affirmed, and pay all damages and costs which may be awarded against it by the St. Louis court of appeals, then this obligation to be void; otherwise, to remain in full force and effect.

Approved by the court Nov. 19, 1880.

BOATMEN'S SAVING BANK, [SEAL.]
By R. J. LACKLAND, *P't.* [SEAL.]
RUFUS J. LACKLAND. [SEAL.]
A. M. GARDNER. [SEAL.]

Attest:

CHAS. F. VOGEL, *Clk.*

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 14 day of Feb'y, 1881.

[SEAL.] CHAS F. VOGEL, *Clerk.*

And afterwards, at the October term, A. D. 1881, of the St. Louis court of appeals, to wit, on the 12th day of October, 1881, the following assignment of errors was filed in said cause, to wit:

60 In the St. Louis Court of Appeals. Oct. Term, 1881.

STATE SAVINGS ASSOCIATION OF ST. LOUIS, Respondent,

vs.

BOATMEN'S SAVINGS BANK, Appellant.

And now comes the said appellant and says that in the record and proceedings of the court below, in the above-entitled cause, there is manifest error, and for error said appellant assigns the following, to wit:

1st. The finding is against the evidence introduced at the trial.

2nd. The finding is against the weight of the evidence.

3rd. The court erred in refusing instruction No. 1 asked by the defendant at the close of the plaintiff's case in chief.

4th. The finding and judgment are against the law, as declared in the instructions given by the court.

5th. The finding and judgment are against the law applicable to the case.

6th. The court erred in refusing to give instructions Nos. 2, 3, 4, 5, & 7, asked by defendant at the close of the case.

7th. The court erred in giving instructions No-. 1, 2, & 3, asked by plaintiff.

8th. The damages assessed are excessive.

9th. The court admitted illegal testimony offered by plaintiff against the objection of the defendant.

10th. The court rejected legal testimony offered by defendant on objection of plaintiff, & of its own motion.

11th. The judgment was for the plaintiff when it should have been for defendant.

12th. The judgment was against the right of the defendant to a judgment in his favor.

61 Under the provisions of the act of Congress of the United States, established and provided for a uniform system of bankruptcy, in force at the time of the transaction between the parties, out of which this controversy arises.

And that said court overruled the motion for a new trial made by appellant.

NOBLE & ERRICK &
A. M. GARDNER,
Att'ys for Appellants.

The respondent says there is no error.

GLOVER & SHEPLEY,
For Pl'f. Respondent.

And afterwards, at the same term of said court, the following judgment was rendered in said cause, to wit:

TUESDAY, *December* 13, 1881.

STATE SAVINGS ASSOCIATION OF ST. LOUIS, Respondent,
vs.
BOATMEN'S SAVINGS BANK, Appellant.

Appeal from the circuit court, city of St. Louis.

Now again come the parties aforesaid, by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said circuit court, city of St. Louis, be in all things affirmed, and stand in full force and effect, and that the said respondent recover of the said appellant its costs and charges herein expended, and have execution therefor. Opinion filed, Judge Lewis absent.

62 Said opinion is in the words and figures following, to wit:

STATE SAVINGS ASSOCIATION OF ST. LOUIS, Respondent,
vs.
THE BOATMEN'S SAVINGS BANK, Appellant.

Appeal from the St. Louis circuit court.

Plaintiff and defendant are banking corporations doing business in St. Louis. The action is upon two checks drawn upon defendant, and held by plaintiff. The cause was tried by the court, a jury being waived. The finding and judgment were for plaintiff.

The following facts appear from the pleadings, evidence, and admissions on the trial:

Cobb, Delhonde & Co. were depositors in the bank of plaintiff, and also in the bank of defendant. They drew the checks in suit, one for $623.42, to the order of Henry Ames & Co., and the second to bearer. These checks were drawn upon defendant. The persons to whom these checks were delivered by the maker endorsed them, and presented them about 23d October, 1874, at the counter of plaintiff. The blank printed checks of Cobb, Delhonde & Co. upon the two banks had a general similarity of appearance. The cashier of plaintiff carelessly supposed the checks were upon plaintiff's bank, and stuck them upon the cancelling knife, and they were, by plaintiff's book-keeper, charged to Cobb, Delhonde & Co., and credited to the parties by whom they were respectively presented. About the 31st October, 1874, the president of plaintiff heard that Cobb, Delhonde & Co. were embarrassed, and directed an examination of their account. It appeared to be overdrawn, but examination
63 showed that it was not overdrawn, but that the apparent overdraft was caused by the mistake as to these two checks, really drawn not upon plaintiff, but upon defendant.

On the 31st October, 1874, Cobb, Delhonde & Co. had at the defendant's bank to their credit a sum more than sufficient to pay these checks, and defendant, at that date, held a draft made by one Bartley and accepted by Cobb, Delhonde & Co., dated 3 October, 1874, payable 40 days after date, for $3,172. Defendants, on the same

31st of October, received written notice from Cobb, Delhonde & Co. that they had suspended. On the same day, and after this notice, plaintiff's clerk presented the two checks in question to the president of defendant, explained how they came to be torn by the cancelling knife, and asked defendant to pay them. The president replied that he did not think they had the money. To this the clerk answered that he had just been informed by Delhonde's son, at the office, that the Boatmen's Savings Bank had more than enough to pay these checks. The president of defendant then said that they held paper of Cobb, Delhonde & Co. to mature; and on the part of defendant he declined to pay the checks. However, as it was possible that Bartley might pay the draft which Cobb, Delhonde & Co. had accepted, and on which the defendant had advanced money on 5th November, 1874, defendant delivered to a third person, Mr. John R. Shepley, of counsel for plaintiff in this action, its cashier's check for the amount of these drafts, and received the checks in controversy; but all hope of payment of this draft being subsequently given up, the cashier's check was returned to defendant and the checks in controversy were given back to plaintiff about
64 5th May, 1875, leaving the parties just as they were. Had the Cobb, Delhonde & Co. acceptance been paid, the check delivered to the third person was, by agreement, to have been delivered to plaintiff.

Cobb, Delhonde & Co. were adjudicated bankrupts in the United States district court at N. Orleans, on March 23d, 1875, on their petition filed 8th January, 1875. The draft of Bartley was credited by defendant with the amount of the balance on open account in their favor, and defendant proved up in bankruptcy the difference only. The credit thus given was $688, being the entire balance of Cobb, Delhonde & Co. with defendant on the opening of its bank on the day the checks were presented—31st October, 1874. Defendant received a dividend on the balance only. Cobb, Delhonde [& Co.] were afterwards discharged in bankruptcy.

There were some attempts to show that the question of the liability of the defendant was by agreement left to John R. Shepley to determine. The trial court found that no such agreement was made, and no more need be said as to that.

The books of defendant show, and it is not disputed, that defendant, from the date of these checks until after their presentation, was in funds to pay them.

1. The accidental defacement of the checks by the holder does not at all impair its right to recover. It would appear, therefore, that according to the doctrine announced by this court in McGrade *vs.* German Savings Institution (4 Mo. App., 330), and in Senter *v.* Bank (7 Mo. App., 532), the judgment in this case ought not to be disturbed.

Accordingly we are asked to review the doctrine of those cases, and mainly, as we understand appellant's counsel, on the
65 ground that we ought to follow the ruling of the Supreme Court of the United States on commercial questions, where

the question is a vexed one and has not been passed upon by the supreme court of the State.

The decisions of respectable courts may be adduced for and against the proposition that the holder of a banker's check may maintain an action at law against the bank having funds of the drawer where presentation has been duly made and payment demanded. After careful consideration we have held that the action is maintainable. To say that our conclusion is one against which strong reasons may not be urged would be to say that the question is not a *vexata quertio;* but it is a *vexata quertio.* We shall neither examine it nor discuss it again. I do not believe that the learned, able, and diligent counsel for appellant in the present case have neglected anything against the rule laid down by us in the cases just referred to that was not urged before us, or that did not occur to the members then constituting this court, when those cases were under consideration. The question is no longer an open one, so far as this court is concerned.

2. It is contended that the payment of the checks was countermanded by the drawer. The only evidence to support this contention is contained in the following letter, addressed by Cobb, Delhonde & Co. to defendant:

"OCTOBER 31ST, 1874.

BOATMEN'S SAVINGS BANK, *St. Louis.*

GENTLEMEN: We regret to advise you we are compelled to suspend. This, we are aware, will be very unexpected to you, and, until very recently, we ourselves had no apprehension of such a necessity; but the heavy losses we have sustained in the recent 66 shrinkage in the prices of provisions, holding, as we did, a large stock, and other losses is the cause. This and our New Orleans house will very shortly make a statement of their condition, and until then we ask your indulgence.

Respectfully, COBB, DELHONDE & CO.,
By F. DELHONDE."

This letter was manifestly not intended to be, and was not in fact, any direction to defendants not to pay checks already given against the funds of Cobb, Delhonde & Co, in their hands.

3. But, it is urged, the U. S. bankrupt act (section 5073) provides that in case of mutual debts or mutual credits the balance only shall be allowed or paid. This deposit, it is true, was in the hands of defendant on 8 January, 1875; but it was in their hands of their own wrong, and because they illegally refused to pay the check of their customer, and claimed to have a lien upon it on account of his paper discounted and held by them, and which had not yet matured. The petition in bankruptcy was not filed until more than two months after the presentation of this check. It was known that the parties to that paper were insolvent, but it was not known that they would ever be forced into bankruptcy or file a petition in bankruptcy. It cannot, we think, be held with any show of reason that a banker might, whilst the baukrupt law was in force, have refused

to pay his customer's checks as soon as he learned that they were embarrassed, on any ground of fear that the banker, by so doing, might possibly be making himself a party to an illegal preference. The right of plaintiff to this money was established on the day of the presentation of the check. When the check was presented there was an equitable assignment of so much of the fund, which,
67 we have no doubt, would have been recognized by the district courts of the United States administering the bankrupt act, as being as valid in the absence of actual fraud as if no bankrupt law had ever been passed.

Defendant did not refuse to pay these checks on any grounds of possible doubt as to whether they might not perhaps have been defaced by the maker, nor because it desired time to inquire as to this. Payment was refused on the distinctly illegal ground that defendant claimed a right to sequestrate the bank account of Cobb, Delhonde & Co. to apply upon an acceptance not yet due, and which might perhaps be dishonored. Then, when the draft matured, without authority to do so, defendant credited the draft with the whole deposit account, and sets up in this action as a ground of defence that it was induced to do so by the acts of the plaintiff, and thereby lost the dividend which it would otherwise have collected from the estate of Cobb, Delhonde & Co. in bankruptcy on the whole amount of their draft. We see no evidence in the case of any agreement or understanding that if the Bartley draft was not paid, and the cashier's check in consequence returned by the third person to whom it had been delivered to pay to plaintiff in case that draft was paid, then the plaintiff would make no further claim on defendant. It is true that plaintiff delayed bringing suit for three years, and it is possible that plaintiff might never have sued but for the decision of this court in the case of McGrade *vs.* German Savings Bank; but plaintiff was under no obligation to hasten to bring suit, lest perhaps defendant might decide a doubtful question of law in its own favor. There was some evidence tending to show that Mr.
68 Shepley, as attorney for plaintiff, stated, on returning to defendant the cashier's check, that there was no further claim, and that the matter was at an end; but this was contradicted; and, by giving defendant's instructions number six the trial court showed that it found in favor of plaintiff, that no such declarations were made. In the absence of any such declaration, we see no evidence of anything in the conduct of plaintiff which ought to be taken as having unfairly mislead defendant to his hurt, and the following instructions are, we think, properly refused:

"7. If the court finds from the evidence that upon the presentation by plaintiff of the checks in question, and refusal by defendant to pay same, the defendant claimed the right to apply the deposit of Cobb, Dolhonde [& Co.] in the defendant's bank on the Bartley draft accepted by Cobb, Dolhonde & Co., and soon to become due, the said Cobb, Dolhonde & Co. then having suspended payment, as the parties knew, and thereupon, at the request of plaintiff, the defendant issued its cashier's check to J. R. Shepley for the amount of the checks in question, and received the checks in question, with the

understanding between the parties at the time that if said draft and acceptance were not paid in due time the cashier's check should be returned by Mr. Shepley to defendant, and the checks in question to plaintiff; that said draft and acceptance was not so paid, and, on request, the said cashier's check was returned by Mr. Shepley with the consent of plaintiff to defendant, who then and there returned to Mr. Shepley for plaintiff the checks in question, and it was then known to the plaintiff and Mr. Shepley that defendant's object was to apply the amount of deposits of Cobb, Dolhonde & Co., equal to said cashier's check, as a set-off on said unpaid draft
69 and acceptance, and said defendant did proceed to apply the amount aforesaid in part payment of said acceptance, and the acceptors having been adjudicated bankrupts, proved up the defendant's claim for only the balance of said acceptance, and thereon only received dividends, and said bankrupts have been duly discharged, and plaintiff did not again assert its claim on the checks in question against defendant until this suit was brought, then the court declares the plaintiff acquiesced in the appropriation of the said deposits by defendants under its claim at the time made, and cannot maintain this action."

As to estoppel, the court found the facts against defendant; and, if there was no estoppel, plaintiff was entitled to recover on the undisputed facts, unless we are to reverse the previous ruling of this court as to the right of a checkholder to sue the bank on which the check was drawn. The rule which was laid down by this court, after solemn argument and serious consideration, in a matter concerning property rights, and which we adhered to when, after the lapse of some time, the same question was again presented, was the warrant to plaintiffs for commencing this action. It is possible that, as counsel for appellant insists, the opposite rule is, after all, the better one. As to this the courts of this country are not agreed. Judge Thompson was not a member of this court when McGrade *vs.* German Savings Institution and Senter *vs.* Bank were decided; but I am authorized to say for him that, were the matter *res integra*, he would be for the rule laid down in those cases, and my
70 own opinion in the matter, I may say, is unchanged. It is to be hoped that the question may before long be set at rest in Missouri by the supreme court; meanwhile, it is our plain duty *stare deciso*, and we shall do so.

The judgment is affirmed. Judge Lewis is absent. Judge Thompson concurs.

R. A. BAKEWELL.

Appeal Bond.

Know all men by these presents, that we, Boatmen's Savings Bank, principal, & Rufus J. Lackland, Geo. S. Drake, and Carlos S. Greely, sureties, are held firmly bound unto the State Savings Association of St. Louis in the full and just sum of twenty-five hundred dollars to be paid to the said State Savings Association of St. Louis, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators,

jointly and severally, by these presents. Sealed with our seals and dated this eighteenth day of January, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the October term, 1881, of the St. Louis court of appeals of Missouri, in a suit depending in said court between said State Association of St. Louis, plaintiff, and said Boatmen's Savings Bank, defendant, judgment was rendered against the said Boatmen's Savings Bank, and the said Boatmen's Savings Bank having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State Savings Association of St. Louis citing and admonishing
71 it to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Boatmen's Savings Bank shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

	BOATMEN'S SAVING BANK,	[SEAL.]
	By its P't, R. G. LACKLAND.	[SEAL.]
Attest:	R. G. LACKLAND.	[SEAL.]
	GEO. S. DRAKE.	[SEAL.]
	C. S. GREELEY.	[SEAL.]

WM. H. THOMPSON,
Sect'y & Cas.

Approved by me as a supersedeas bond.

SAM. F. MILLER, *Judge.*

Endorsed: United States circuit court, eastern district of Missouri. State Savings Association, resp., *vs.* Boatmen's Savings Bank. Bond, $2,500. Filed January 18th, 1882. Jos. F. Baier, clerk.

72 STATE OF MISSOURI, *ss:*

I, Joseph F. Baier, clerk of the Saint Louis court of appeals, do hereby certify the above and foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same appear of record and on file in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court, at office, in the city of Saint Louis, this 8th day of February, A. D. 1882.

JOS. F. BAIER, *Clerk.*

Endorsed on cover: Missouri, St. Louis court of appeals. No. 223. The Boatmen's Savings Bank, plaintiff in error, *vs.* The State Savings Association of St. Louis. Filed 16th June, 1882.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY.
CLERK.

114-265

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE BOATMEN'S SAVINGS BANK,
Plaintiff in Error,
vs.
THE STATE SAVINGS ASSOCIATION, OF ST. LOUIS.
No. 223.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS, MISSOURI.

STATEMENT, ASSIGNMENT OF ERRORS, POINTS AND AUTHORITIES AND ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN W. NOBLE,
JOHN C. ORRICK and
A. M. GARDNER,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE BOATMEN'S SAVINGS BANK,
Plaintiff in Error,
vs.
THE STATE SAVINGS ASSOCIATION, OF ST. LOUIS.
No. 223.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS, MISSOURI.

STATEMENT, ASSIGNMENT OF ERRORS, POINTS AND AUTHORITIES AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

The action was commenced in the Circuit Court of the City of St. Louis, August 4, 1878, by the State Savings Association against the Boatmen's Saving Bank, on two bank checks drawn on the latter bank by a firm styled Cobb, Dolhonde & Co. The checks were dated in September and October respectively, 1874, and presented by the State Savings Association as holder, on October 31, 1874, for payment, which the bank, on which the checks were drawn, refused to make. The Boatmen's Savings Bank, by its answer, denied its liability to the plaintiff in

any event, (Printed Record, p. 5.) The answer, as a further defence, also set forth (Printed Record, p. 4,) that on October 3rd, 1874, one Bartley drew his bill of exchange to his own order on Cobb, Dolhonde & Co., at New Orleans, at forty days, for $3,172.75, and at the same time endorsed and assigned it to the defendant, and the drawees then and there accepted it; that the drawers of the checks, Cobb, Dolhonde & Co., failed in business on October 31, 1874, and on that day, and *before the checks mentioned, or either of them, were presented*, notified the defendant of their failure and suspension; that after this suspension the drawers never resumed payment, but were, on their voluntary petition, adjudicated and declared bankrupts in the District Court of the United States, for the District of Louisiana, at New Orleans, and there, afterwards, received their discharge; that the acceptance held by the defendant was not paid at maturity; that the deposit was credited, or set off, by defendant, on the acceptance, and the debt proven against the bankrupts for the balance only, and on this balance only were dividends paid by assignee. The pleadings were under the Missouri Code System, and there was other matter set forth in the answer not pertinent to the questions now raised. The reply was a general denial of the answer.

The testimony was of considerable volume, but as to the matters presenting questions within this jurisdiction, the following facts we deem of chief importance.

It was admitted by plaintiff at the commencement of the defence, (Printed Record p. 16,) that at the time the particular checks were presented, there was owned and held by the Boatmen's Savings Bank the Bartley acceptance described in the answer, as hereinbefore stated; that Cobb, Dolhonde & Co. had suspended payment in point of fact on or before October 31, 1874; that they were adjudicated bankrupts at New Orleans in the United States District

Court, on March 23, 1875, on a petition filed January 8, 1875; that the Bartley acceptance was credited with the amount of their balance on open account with defendant, and defendant proved up in bankruptcy only the difference. The credit was the whole amount of the balance in favor of Cobb, Dolhonde & Co., at defendant's bank, $688.42, and defendant received dividends only on the balance. The plaintiff presented its claim against the bankrupt estate for $3,377.65, and received dividends thereon amounting to $753.99; the defendant, on its claim, received two dividends, one on July 8, 1875, $225.59, and the other on July 31, 1876, $37.55, and no more, and Cobb, Dolhonde & Co. were subsequently discharged in bankruptcy.

The following letter was introduced in evidence through witness Lackland, who swore that it was genuine and received by the Boatmen's on the day of its date. (P. 17):

OCTOBER 31, 1874.

"BOATMEN'S SAVINGS BANK, ST. LOUIS.

"*Gentlemen:*

"We regret to advise you we are compelled to suspend. This, we are aware, will be very unexpected to you, and, until very recently, we ourselves had no apprehension of such a necessity, but the heavy losses we have sustained in the recent shrinkage in the prices of provisions, holding, as we did, a large stock, and other losses is the cause. This and our New Orleans house will very shortly make a statement of their condition, and until then we ask your indulgence.

Respectfully,

COBB, DOLHONDE & CO.

By F. DOLHONDE."

This witness testifies (p. 17) distinctly, that defendant received this letter before Mr. Pettis came there with the

checks. He says that whenever Mr. Pettis may have been there, it was after witness had received the letter; that Pettis brought the checks to him and wanted them paid, which was refused.

It also appeared in evidence that the State Savings Association had received this same notification before its agent set out to make demand of payment on the Boatmen's Bank. (P. 12.) In fact the State Savings had paid the checks as if drawn on itself, and only discovered its mistake when, upon the notice of suspension, it cast up the account of Cobb, Dolhonde & Co. and found it overdrawn to amount of their checks, which, on closer inspection, it found were on the Boatmen's Savings Bank and not on it, the State Savings. (P. 12).

Much time elapsed before the plaintiff brought this action, (nearly four years,) the petition not having been filed until August 14th, 1878. (Printed Record p. 2.) In the meantime the bankruptcy proceedings had run their course, and Cobb, Dolhonde & Co. been discharged. (P. 16.) But it also happened that the St. Louis Court of Appeals had announced as law that the holder of an unaccepted check could recover against the banker on whom it was drawn at law. So that the defendant in this cause contended both against the general proposition of liability to the holder under any circumstances, and also set forth its right and claim to have its set-off upon the Bartley acceptance, under the statute of the United States on bankruptcy, acknowledged as valid by the State Court, as thereby the debt for the deposit had been satisfied, as between the depositors, or their assignee, and the defendant, and the plaintiff could not therefore recover. This was the claim of set-off allowed and granted by the Bankrupt Law.

See Sec. 5,073, U. S. R. S.

And defendant also claimed that under Secs. 5021-5128, R. S. U. S., relating to preferences in bankruptcy, the defendant was inhibited from paying the checks at the time they were presented, being after notice of suspension and insolvency to both the holder, the State Savings Association, and the defendant, the Boatmen's Savings Bank.

The State Courts decided against these claims, holding the defendant had no such right of set-off and the notice of suspension worked no change upon the supposed right of the check holder, or obligations of the defendant bank.

These questions were raised in the lower Courts under the general denial (p. 5,) and other portions of the answer which averred the facts, and the evidence particularly relating to the mutual debts, the set-off, the bankruptcy and the details connected therewith, and the instructions asked by defendant but refused by the Court. The pleadings were according to the code system of practice requiring statements of facts.

The following instruction, under the issues made, asked by defendant, was refused. (Printed Record p. 34.)

"If the Court finds from the evidence that defendant refused payment of each of the checks, described in the petition, on presentation and demand, then this action can not be maintained by the plaintiff against defendant, and the finding must be for defendant."

Also the following instruction, (p. 34):

"The Court declares that if before either of the checks described in the plaintiff's petition was presented by the plaintiff to the defendant and payment thereon demanded, the drawers had notified the defendants that they had suspended payment, then the plaintiff cannot recover in this action."

In connection with this last instruction, instruction No. 7, (p. 35,) which was also refused, set forth the right of set-off more particularly, but connected also, as that instruction went, with the further defense of acquiescence.

Exceptions were duly preserved to these refusals of instructions.

And in the St. Louis Court of Appeals the propositions were urged, under the 12th assignment of error, as follows: (Printed Record p. 39.)

"The judgment was against the right of defendant to a judgment in its favor, under the provisions of the Act of Congress of the United States, establishing and providing for a uniform system of bankruptcy, in force at the time of the transactions between the parties, on which the controversy rests."

There was judgment in the trial Court for plaintiff, and this, on appeal, was affirmed by the St. Louis Court of Appeals. The Court of Appeals had final jurisdiction in the State, as the amount involved does not exceed twenty-five hundred dollars, (R. S. 1879 Mo p. lxxi, Const. of Mo., 1875, Art. VI, Sec. 12,) and the cause was therefore brought to this, the U. S. Supreme Court, directly by writ of error. The amount involved in this particular action is comparatively small. But the injustice of the judgment is felt by the defendant to be very great and to effect commercial questions of great importance, and therefore this Honorable Court is called upon to decide.

ASSIGNMENT OF ERRORS.

The plaintiff in error comes and says that in the record and proceedings aforesaid there is manifest error in this, to-wit:

1. In deciding against the right of the defendant to have set-off the debt due to Cobb, Dolhonde & Co., for deposit, now sued for by the plaintiff, and the debt due from them, as acceptors of the Bartley draft, against one another, under the statute of the United States, then in force, relating to bankruptcy.

2. In deciding that after notice of their suspension of payment by Cobb, Dolhonde & Co., to defendant, before presentation of the checks in question, said firm subsequently having been and within four months adjudicated bankrupts, defendants were not protected, by the provisions of the United States statute in relation to bankruptcy, from any liability to plaintiff at the commencement of this action.

3. In affirming the judgment of the Circuit Court of the City of St. Louis.

4. The said judgment was given in favor of said State Savings Association of St. Louis, whereas by the laws of the land it ought to have been given in favor of said Boatmen's Savings Bank.

Wherefore the Boatmen's Savings Bank, plaintiff in error, prays said judgment may be reversed, annulled and held for nothing, and it may be restored to all things it has lost by reason thereof.

POINTS AND AUTHORITIES.

I. *The right of the defendant to appropriate the deposit or debt due the depositor in part satisfaction as a set-off of its demand against the drawers of the check because of their acceptance of the Bartley draft, was a right and privilege granted by the Bankrupt Act, and having been exercised, judgment on the checks against defendant is a decision*

against that right as claimed in defense of the plaintiff's suit, and should be corrected by this Honorable Court.

Sec. 5073, R. S. U. S. relating to bankruptcy.

"In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other and the balance only shall be allowed or paid."

This Court will reserve the power to construe when debts or credits exist or when they are mutual. It will not leave this to the varying opinions of State tribunals.

Sharpe v. Doyle, 102 U. S. S. R. 686–690.
Feibelman v. Packard, 109 U. S. S. R. 421–426.
Libby v. Hopkins, 104 U. S. Rep. 303.

II. *Had the deposit not have been applicable to the acceptance, it would have passed to the assignee in bankruptcy and the judgment below could have been arrived at only by deciding against the validity of the express terms of the bankrupt law.*

Sec. 5044, R. S. U. S.
Sec. 5021, R. S. U. S.
Sec. 5128, R. S. U. S.

Had the assignee sued for the deposit, evidently he would have recovered, notwithstanding the bank, here plaintiff in error, should have set up as a defense, that these checks had been presented and payment demanded.

Bank of Commerce v. Russell, 2 Dillon R. 215.

III. *Neither the drawing of the checks by the depositor nor their subsequent presentation by the holder affected the fund on deposit, or the right or liability of the defendant bank under the bankrupt law.*

1. A check is not an assignment of the money deposited or of the right to it, in law or equity.

Dyken v. Leather Manufacturers' Bank, 11 Paige R., 616.
Dana v. Bank, 13 Allen R., 445.
Hancock v. Colyer, 98 Mass. R., 247.
Chapman v. White, 6 N. Y. R., 412.
Wharton v. Welker, 4 Barn. & Cress., 163.
Mandeville v. Welch, 5 Wheat. R., 277–286.
Attorney General v. Insurance Co., 71 N. Y., 325.
Dickinson v. Coates; Merchants' National Bank v. Coates, Oct. Term, 1883, Sup. Court Mo., 79 Mo. R.—(not yet published.)

2. That a payee or endorser cannot maintain an action on an unaccepted check against drawee refusing payment.

Supreme Court of the United States—

Bank of Republic v. Millard, 10 Wallace R., 152.
Marine Bank v. Fulton Bank, 2 Wallace R., 252.
Thomas v. Riggs, 5 Wallace, 663.
Bank v. Whitman, 94 U. S. Rep., 343.
Libby v. Hopkins, 104 U. S. Rep., 303–308.

Supreme Court of Missouri—

Clements v. Yeates, 69 Mo. R., 623.
Kimball v. Donald, 20 Mo. R., 577.
Ford v. Angelrodt, 37 Mo. R., 57.
Bank of Commerce v. Bogy, 44 Mo. R., 17.
Kneck's Admr. v. U. S. Sav. Ins., 2 Mo. Appeals R., 563 (approved in Union Bank of Quincy v. Tutt, 5 Mo. R., 346.)
Merchants' National Bank v. Coates, Sup. Court Mo. 79 Mo. R., 168 (not yet published
son v. Coates, Oct. Term, 1883,

United States Circuit Court of Missouri—

Bank of Commerce v. Russell, 2 Dill. R., 215.

Supreme Court of Massachusetts—

Carr v. Nat. Security Bank, 107 Mass. R., 49.
Ballard v. Randall, 1 Gray, 605.
Dana v. Third Nat. Bank, 13 Allen R., 445.

Court of Appeals of the State of New York—

Chapman v. White, 6 N. Y. (2 Seld.) 412.
Duncan v. Berlin, 60 N. Y. (15 Sick.) 151.
Ætna Nat. Bank v. Fourth N. Bank, 46 N. Y. R., 42.
Tyler v. Gould, 48 N. Y. R., 682.
Atty. Gen. v. Ins. Co., 71 N. Y., 325.

Supreme Court of Maryland—

Moses v. Franklin Bank, 34 Maryland, 574.

Supreme Court of Pennsylvania—

Loyd v. Caffrey, 46 Penn. R., 410.

Others might be cited, but these are sufficient to show how well settled the rule was, when assailed by the St. Louis Court of Appeals.

IV. This raises the federal question, for while the State Court may decide a principle of commercial law, without being subject to review thereon, if nothing else is involved, it cannot do so, so as to deprive a party of the benefit of a United States statute, which deprivation clearly arises upon the erroneous decision of the commercial rule.

Murray v. Charlestown, 96 U. S. R., 442.
Sharpe v. Doyle, 102 U. S. S. C., 686–690.
Feibelman v. Packard, 109 U. S. S. C., 421–426.

The United States Supreme Court is not bound by State decisions on commercial law.

Oates v. National Bank, 100 U. S. S. C. R., 239–246.

In Libby v. Hopkins, 104 U. S. Rep., 308, a distinction is taken supporting this view, as it, in effect, says a deposit due from a banker may be set off against a debt due to him from the depositor, and cites the principle laid down in Bank, etc., v. Millard, 10 Wallace, 152, as authority in point.

It can make no difference whether the set-off is claimed in this suit itself, or is proven to have been legally made in the bankrupt court, and allowed, and that disposition of the fund brought here as a defense.

The plaintiff must show title to the fund.

V. *The suspension of payment of the drawers of the check, followed, as it is admitted it was, by proceedings in bankruptcy and final discharge, sustains defendant, under the act of Congress relating to bankruptcy, in refusing payment.*

(*a*) The plaintiff had become only a general creditor of the bankrupt on the checks *before presentment*, even under the theory of the State Court.

McGrade v. German Savings Bank, 4 Mo. App. R., p. 339.

(*b*) After bankrupt's suspension, and at time of presenting checks, the plaintiff was thereby endeavoring to get a preference as creditor of a debtor in contemplation of insolvency, for the *plaintiff* knew of the act of bankruptcy.

Traders' Nat. Bank v. Campbell, 14 Wallace R., p. 87, pp. 97, 98.

(*c*) The *defendant* knew the insolvency of debtor be-

fore presentation, and was bound to refuse to pay the check under the bankrupt law.

Fox v. Gardner, 21 Wallace R., 475.
Bank of Commerce v. Russell, 2 Dillon, R., 217.
Vernon v. Hankey, 2 T. R. 113.
Mathew v. Sherwell, 2 Taunt. 439.

ARGUMENT.

From the preceding statement it appears that besides the other defences made against the bank checks attempted to be collected off the defendant, it was claimed by it that by virtue of the proceedings in bankruptcy which began within four months after the suspension of the drawers and the presentation of the checks for payment, the defendant acquired, under the bankrupt law, the right to set off the debt due the depositors, Cobb, Dolhonde & Co., who drew the checks, to the extent thereof against the debt of Cobb, Dolhonde & Co., which matured within a few days after the presentation of the checks, being the acceptance of said depositors on the Bartley draft, held by the defendant at the time the checks were presented. And secondly, that under the provisions of the bankrupt law, by virtue of the suspension of the depositors and the notice thereof to the defendant, before the presentation of the checks, and by virtue of the commencement of the bankrupt proceedings within four months thereafter, the defendants were not only inhibited from paying or accounting for the deposit to anyone else than the assignee in bankruptcy, but had the defendant paid the checks to the plaintiff when presented, it would have still remained liable to said assignee for the full amount.

We shall present these points in their order.

1. That the right of set-off granted by the bankrupt law in the section quoted in our statement, is involved in the

present action, and giving judgment for the plaintiff below was a decision against this right.

We think this will clearly appear by considering the right of the defendant to its set-off, without reference to the checks, first; and then by inquiring whether the presentation of the checks to any degree affected this right.

It certainly is not open to dispute, but that, as the uncontradicted testimony shows, the defendant below held the acceptance of Cobb, Dolhonde & Co. for over three thousand dollars, which matured on November 12, 1874; that the defendant had been notified of the suspension of the acceptors on October 31, 1874, and that proceedings in bankruptcy were commenced by them January 8, 1874; that the defendant did apply the debt due from Cobb, Dolhonde & Co. as acceptors of the Bartley draft, to the full extent thereof necessary, on the debt due to them on account of the deposit in the bank, and that this set-off was acknowledged by the Register and Assignee in Bankruptcy, and the defendant received its dividends on the balance of the acceptance only, as it was proved up against the bankrupt estate.

Here was an ordinary and straightforward transaction under a strict compliance with the provisions of this statute of the United States. The set-off was an admission of a debt by the defendant to the assignee and was satisfied by an equal amount credited on the acceptance. These were mutual debts and the set-off was clearly authorized by the Act of Congress. Had the application not have been authorized and made, the defendant would have been able and undoubtedly would have proved up against the estate the whole amount of the bankrupt's acceptance. In a word, by the transaction as made, the defendant legally accounted for the deposit to the Assignee in Bankruptcy, and satisfied the debt in the manner authorized by law of the United States, and in the only manner thus sanctioned as was suggested, if not absolutely de-

cided in Traders National Bank v. Campbell, 14 Wallace, R. pp. 97-98.

Had this right been denied by the Bankrupt Court, certainly the proper United States Courts would have had jurisdiction to have corrected the error. And this right having been denied directly by a State Court of last resort, in the State, this Court has jurisdiction to correct the error without regard to the amount involved.

It is apparent as a general result that if, under the judgment of the Circuit Court of the City of St. Louis, where the cause was originally tried, and the affirmance thereof by the St. Louis Court of Appeals, which has final jurisdiction under the Constitution and laws of Missouri of all actions of this character when the amount involved does not exceed twenty-five hundred dollars, the defendant has to pay the holder of the checks the whole amount applied on the acceptance, the set-off is not only destroyed in effect, but dividends have been declared for and received to a less amount by the defendant, than if the right claimed had not been exercised. In a word, if the set-off was authorized and rightfully made, the plaintiff cannot recover for the same deposit unless some prior lien was secured thereon on the presentation of the checks.

Sharpe v. Doyle, 102, U. S. S. R., 689.

It is to be observed that, of course, this set-off is not against the plaintiffs' checks, and could not have been pleaded as such. But having been authorized and made in settlement with the assignee in bankruptcy, these facts are set forth in the answer as a defense, and proven. The evidence, by admission of the plaintiff (Printed Record, p. 16), shows the transaction completely as we claim it. The question, the substantial right, therefore involved in the present controversy is this right of the defendant to have

settled for the deposit, as was done, with the assignee. If that was rightly done there cannot still be a liability to plaintiff. The plaintiff is indeed claiming only as an assignee by virtue of the checks and endeavors to take precedence of the assignee in bankruptcy. It cannot do it. The checks were in no sense an assignment of proportionate amounts of the general deposit. See the authorities cited by us (under proportion) above.

The only process by which the Courts below arrived at a conclusion and judgment against the defendant was by holding that the checks and their presentation at the time thereof effected an assignment of the deposit to the holder, the State Savings Association, and upon refusal of the defendant to pay, gave the plaintiff a cause of action then and there.

It may be true indeed that a State Court has the right, independent of any decision laid down by this Honorable Court, to determine for itself a decision of commercial law, and the same cannot be reviewed in this Court ordinarily. But we insist that when such rule works in effect, as in the present case, the destruction of a right exercised under a statute of the United States, such as the Bankrupt Law, and the rule is in contradiction of the previous decisions of this Court, the right of the defendant will be passed upon as a right set up under the United States statute, and as affected only the rules of commercial law as this Honorable Court has determined them, and not as the State Court has adjudged them.

And we further insist that if, upon looking into the decisions of the State Courts as to the particular question involved, it is discovered that the Supreme Court of the State has determined the rule in accordance with that announced by this Honorable Court, the conclusion of the inferior tribunal which has in the particular case indeed final State juris-

diction, because only of the amount involved, will not be regarded as lawful, but that the case will be here determined, according the very right of the parties, as it exists under the laws of the United States.

We insist, in a word, that the question here is the right of set-off as exercised and presented as a defence against this plaintiff's claims upon the checks; and that it is not, except as incidental thereto, the right of a holder of an unaccepted check to recover against the bank upon which it is drawn if payment is refused upon presentation. The real question is that presented by the defence, and that is a federal question.

"Everywhere in our decisions (this Court has said) it "has been held that we may review the judgment of a State "Court when the determination or judgment of that Court "could not have been given without deciding upon a right or "authority claimed to rest under the Constitution, laws or "treaties of the United States, and deciding against that "right."

Murray v. Charleston, 96 U. S. Sup. C. Rep. 442.

There is no case that can be stated within a reasonable view that can present our position any plainer than the case in hand, where a pretended rule of commercial law is asserted by the Court below to defeat the defendant's right under the United States statute, which is not law by the decisions of this Court or the Supreme Court of the State where it has been asserted.

So it was held in Sharpe v. Doyle, 102 U. S. S. R. 686, against the opinions of the Superior Court of the City of New York; and in Feihelman v. Packard 109, U. S. S. C. 421, against a long line of decisions of the Supreme Court of Louisiana.

II. These propositions, we deem, do not require further discussion, and we have next to consider whether the presentation of the checks affected the right of the defendant to its set-off.

There was nothing sound in the position assumed by the Circuit Court of the City of St. Louis or the St. Louis Court of Appeals, that the presentation of the checks create an obligation of the bank to pay. The St. Louis Court of Appeals conceived this notion between the time the particular checks here sued on were presented, and the date this suit was brought, which was not until 1878. That Court concedes this in its opinion in this case above referred to. But the Supreme Court of Missouri, to which the St. Louis Court of Appeals is subordinate, had before announced principles clearly indicating its views to the contrary, although it did not have occasion to pass upon the proposition directly until the case of Coates v. Merchants National Bank, recently before it, when it declared the law to be directly opposed to the position of the Court of Appeals. This case will appear on 79 Mo. R. 166. The position of the Court of Appeals so taken affected the interests of the inhabitants of a large part of the same territory over which the United States Court for the Eastern District of Missouri presided, and which last named court was bound to follow the decisions of Honorable Supreme Court of the United States. This of course led to doubt and confusion. It destroyed the uniformity of the law and its obligations. That which bound one class of citizens of the same State did not bind another class; that which the same citizen was bound to do for one class of checkholders, he was not bound to do for another. If one man made two checks on the Boatman's Savings Bank for $500 each, one to a citizen of Missouri and the other to a citizen of Illinois, and they both sued on refusal of the bank to pay, the citizen of Missouri

abs p. 250

could get a final judgment in his favor on the check, and the citizen of Illinois, who would be taken into the United States Circuit Court, would be defeated, because the rule of commercial law there was different. And, in this manner, in a great commercial metropolis, the rule of law well supported by the opinions of the very highest courts in the country, and beyond recall determined by the Supreme Court of the United States, many years before the McGrade case was decided, was broken and disjointed by the St. Louis Court of Appeals, not only without authority of the Supreme Court of the State, but against its express declaration of what the law in this particular is.

The Supreme Court of Missouri in Ivory v. the Bank of Missouri, 36 Mo. R., 475, had held that a check is a bill of exchange. In Moody et el. v. Mack., 43 Mo. R., 212, that a check is under the same rules as a draft. In Morrison & Lackland v. McCartney, 30 Mo. R., 188, that the drawer of a check was liable thereon as original debtor: in Adams v. Darby & Barksdale, 20 Mo. R., 162, that the drawee was liable to the drawer for the act of not accepting a check: and in Clements v. Yeates, 69 Mo. R., 623, (and other decisions we have cited in our brief), that the payee could not sue on an unaccepted draft. The Court did not in Ivory v. the Bank qualify its language, but asserted broadly that a check is a bill of exchange; and it asserted beyond all question, in Clements v. Yates, that the payee could not recover against the drawee on an unaccepted bill of exchange.

These were, we submit, decisions that should have led a subordinate court to coincide with the rule thus announced, in terms at least, rather than to hold litigants to a contrary doctrine in cases where the superior could not be reached. And, when in the same city, and by authority of the greatest and most respectable tribunal in the nation, the rule had been distinctly announced against the recovery by

a payee of a check on which a payment had been refused; that rule should not have been set aside as to certain cases; when it would have prevailed as to others. The language of the Supreme Court of the United States was as follows, in Bank &c., v. Millard, 10 Wallace, p. 56:

"As checks on bankers are in constant use, and have "been adopted by the commercial world generally as a sub- "stitute of other modes of payment, it is important for the "security of all parties concerned, that there should be "no mistake about the status which the holder of a check "sustains toward the bank on which it is drawn. It is very "clear that he can sue the drawer if payment is refused, but "can he also, in such a state of case, sue the bank? * * " * * On principle there can be no foundation for an "action on the part of a holder unless there is a privity of "contract between him and the bank. * * * * "The right of the depositor, as was said by an eminent "judge (2 Selden, 417), is a chose in action, and his check "does not transfer the debt, or give a lien on it to a third "person without the assent of the depositary. This is a "well established principle of law, and is sustained by the "English and American decisions."

This has been re-affirmed.

Bank v. Whitman, 94 U. S. Rep., 343.

These decisions were upon the ground asserted by the Court of Appeals itself in Knecht Adm'r v. U. S. Sav. Ins. (2 Mo. Appeals, 563-564) that the ordinary relation existing between a bank and its current depositor is simply that of debtor and creditor; that the right of the depositor to his deposit is a chose of action, and the check does not transfer it without the assent of the depositary; that there is no assignment because the depositor can recall the check or successfully forbid its payment; that the remedy in case of

refusal to pay is by the drawer against the bank for his deposit, and also for damages for refusal to pay; and the remedy of the payee is against drawer, which may exist without even notice of non-payment, as was held in Morrison & Lackland v. McCartney, 30 Mo., R. 188.

This system of principles, like the rest of that great system of law which the Courts of great States and communities have perfected in the lapse of time, was based upon plain common sense, gave to each his ordinary and well understood right, and laid upon each his limited and well defined obligation.

The first case that we have been able to find to the contrary is that of Forgarties *et al.* v. Bank (1860) 12 Richardson's R. 518, where there was a dissenting opinion, (S. C. Am. Law Reg., p. 393). In the American Law Register, N. S., Vol. 2, p. 98, (1862), it is said that the reasoning of the South Carolina Court was as novel and unprecedented as its decision.

We present the basis of the opposite doctrine, for a few moments. The Court below expressed itself as follows in McGrade v. German Savings Inst., 4 Mo. Appeals, R. 339:

"Now it is said by those who hold that the holder of "the check can sue the bank that the law raises an *implied* "promise from the usage or course of business of the par- "ties or the general commercial community. * * * "The depositor can countermand the check up to the moment "of presentment and demand, because up to that moment no "obligation from the bank to the check holder can exist, "since checks are to be paid only in the order of present- "ment, not in the order of date. The act of presentment, "and demand, by mercantile usage and the understanding of "all parties interested in the fund or in the check, *creates* "the obligation to pay the check holder, and is an absolute

"appropriation of the fund by the holder, as the mere "drawing and delivering is, in some respects, an appropria- "tion of the fund by the drawer, since the funds after that "cannot honestly be withdrawn by the drawer as a general "thing, and ought to remain until called for, although the "bank could not pay if forbidden by the drawer, and circum- "stances may justify such countermanding of the check."

In Senter v. Bank 7 Mo., App. Rep., 532, the Court again says (p. 537): The contract now insisted upon, has for its basis the common understanding of banker, customer and holder, and this understanding rests upon a course of dealing as well established, perhaps, as any in the business community.

The opinion in McGrade's case was delivered July 3, 1877.

The gist of this opinion was in the propositions that:

1. That the *promise* is implied.

2. That it is implied for the *usage* of the general commercial community.

3. That it is the presentation and demand *creates* the obligation to pay.

4. The depositor can countermand the check up to the moment of presentation and demand.

We submit that it is a somewhat remarkable position to assume that the commercial usage to pay all checks of a depositor, so long as he has money deposited in the bank, is so universal as to raise an implied promise in favor of the payee against the particular bank defendant who has refused to pay, where it cannot be disputed, but that the pronounced law of the Courts having jurisdiction over the territory where the promise is asserted to have thus originated,

was that the bank had the legal right to so refuse payment, and the payee of the check was remediless against it.

In the case of the Schooner Reeside, 2 Summer, 567, Justice Story expressed himself as follows: "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade to control, vary or annul the general liabilities of parties under the common law as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well known and well settled principles of law. And I rejoice to find, that of late years, the courts of law, both in England and America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them."

In the present case there was no usage proven even, and we assert, most respectfully, it is a voilent assumption to base an implied promise on a usage of paying checks of depositors, when the usage had been just as common not to pay them.

The results of the opinion of the Court of Appeals are not as satisfactory as those the old rule produced. For instance, it renders the bank liable to two different parties, because of the same transaction. The payee recovers the amount of the check. The drawer may recover because of the refusal to pay. The reply that this is not the only case upon which a party may be liable to two actions for the same misconduct, does not, we think, meet the case; because this is not adding a new remedy where none existed before, but it is a case giving the remedy to a new party, without taking it away from the party recognized by the old law as

having it. If the payee is defeated in such an action as this in the National Courts, the depositor might yet get his deposit by suit; so his right to sue for the draft still exists, in conjunction with his right to sue for damages for not accepting. There is no certainty as to whom the bank is legally liable until the suits are ended.

Again, the position that the doctrine, that the payee can sue, serves best the ends of justice, goes lamely with the admission that the drawer can, at any time prior to the payment, countermand the check, without having any good reason therefore. The drawer being the original debtor on the check, if the check is to be the basis of this claim, for justice sake, ought to be bound above all others to this contract, but he is left at liberty to execute his unjust purpose, and thus not only defeat the payee, but illustrate by his power that the payee really has no vested right in the fund by virtue of the check. Thus he who makes an express written order on the fund is permitted to avoid it, so far as the particular fund is concerned, without cause, while the Court binds the bank to pay the fund to the holder of the checks on an implied promise, based upon an alleged usage of the commercial world, assumed to have arisen and to exist under decisions of law, there finding to the contrary.

But so far from any argument based upon the authority of this Honorable tribunal, or any other, having weight with the Court below, this is its language, in its opinion, in this case, (Mo. Appls, Rep., Vol. 11, p. 296,) "Accordingly, we are asked to review the doctrine of those cases, and mainly, as we understand appellant's counsel, on the ground that we ought to follow the ruling of the Supreme Court of the United States on commercial questions, when the question is a vexed one and has not been passed upon by the Supreme Court of the State. The decisions of respectable Courts may be produced for and against the proposition that

the holder of a banker's check may maintain an action at law against the bank having funds of the drawer, where presentation has been made and payment demanded. After careful consideration we have held that the action is maintainable. To say that our conclusion is one against which strong reasons may not be urged, would be to say that the question is not a *vexata quæstio*. But it is a *vexata quæstio*. We shall neither examine it nor discuss it again."

One need not search far down the stream we submit, to discover who is guilty of vexing it, or who commenced the quarrel.

III. But as to our second general proposition under the bankrupt law.

As we have said, the bankrupt law was in force at the time, and we claim that under that law both the plaintiff and defendant were, at the time the plaintiff attempted to assert its cancelled checks, affected with notice of the insolvency of the drawers of the checks, and any payment that the defendant might have made would, after such notice, have been void, and would have given a preference to a general creditor, contrary to the provisions of that act.

Strain v. Gourden, 11 B. R., 156,
Fox v. Gardner, 21 Wall. R., 475,
Bank of Commerce v. Russell, 2 Dillon R., 217.

In this latter case Judge Dillon holds the following language; "It is next claimed that the draft drawn by the bankrupts for $413.16 on the Second National Bank, where they had at the time $2,000 on deposit, and which draft was protested, amounted to an equitable assignment of that amount in favor of the plaintiff, and that this equity should be judicially recognized and enforced as against the assignee. If it was assumed or conceded that under any circumstances

such a draft can amount to an equitable assignment in favor of the payee of that amount of the drawer's funds, in the hands of the drawee, such a principle cannot be applied where it would contravene the purpose of the bankrupt act. The plaintiffs, as the holders of the draft drawn by the bankrupts, were simply creditors like other draft-holders, and it would scarcely do to say that when private bankers become insolvent, holders of their bills shall, *to the extent of funds in the hands of the drawee*, be entitled, as against other creditors, to priority."

In Fox v. Gardner, 21 Wallace R., 475–8 the language is as direct and emphatic.

"On the adjudication of bankruptcy the possession and ownership were transferred to the assignee. The attempted transfer by the bankrupt was fraudulent and void. It follows, the debtor yet holds it for the assignee and that the assignee may sue herein for its recovery."

So in the present instance the act of suspension was an act of bankruptcy.

Vernon v. Hankey, 2 T. R. 113.
Mathew v. Sherwell, 2 Taunton, 439.

It was a declaration of the most formal kind that Cobb, Dolhonde & Co. were not only in contemplation of insolvency, but were insolvent.

The checks drawn by them on the defendant had never been presented, and even under the construction of the effect of drawing and delivering a bank check made by the lower Courts, it has not been asserted that any change of rights to the fund is created, until presentation of the check.

Before the checks were presented, both the plaintiff who held the checks and the defendant on whom the checks were drawn had been formally notified by Cobb, Dolhonde

& Co. of their insolvency; and the subsequent presentation of the checks was an attempt to contravene the effect of the Bankrupt Act, which the holder of the checks was bound to know would come into operation upon the insolvency, and which did so within sixty days. The deposit became in law the property of the assignee, and it would have been no defence for the depositary to have said it had paid it to the States Savings Association under the circumstances of this case. The Bankrupt Law declared a prohibition against preferences to creditors, and authorized the assignee to recover back the money, if the person was adjudged a bankrupt, and prohibited any person, being insolvent, or in contemplation of insolvency, within four months of the filing of the petition, with a view to give a preference, from making any payment, assignment or transfer of his property, either directly or indirectly, the person receiving such payment, assignment, etc., having reasonable cause to believe such person insolvent, and knowing such payment, assignment, etc., was made in fraud of the act and declared the same should be void and the assignee might recover the property or the value of it from the person so receiving it or so *to be benefited*.

In Fox v. Gardner, 21 Wallace, 478, this Court has held that this section authorizes a recovery from the person *paying* as well as from the person *receiving* the preference, and we submit from what is said in that case, it can here scarcely admit of a doubt, that if the defendant bank, with the notice of insolvency of the drawers, had paid the same, it would have been still liable to the assignee.

In fact this defendant bank could not have attached the deposit in its own hands to have secured it to be applied on the Bartley acceptance at its maturity.

Traders National Bank v. Campbell, 14 Wallace, pp. 87, 97, 98.

By the principle of this last case, the attempt by the States Savings Association to get the deposit by presenting the check after notice or insolvency of the drawer, was against the spirit of the Bankrupt Law, and had the Boatmens' Bank paid with the notice it had, it would have had to pay the assignee over again. And yet the St. Louis Court of Appeals reverses all these rules of construction of the Bankrupt Law, and holds just the contrary, saying the right act for the Boatmen's Bank to have done was to have paid the checks and not to have proceeded under the Bankrupt Law and had its debt to the bankrupt set-off against his debt to it, under the direction and with the consent of the real owner of the fund, the assignee of Cobb, Dolhonde & Co.

The States Savings Association proved up its own claim against the same bankrupts, and yet it by an afterthought, and upon an unsound and unsupported interpretation of the law made by the St. Louis Court of Appeals, endeavors to compel payment of the defendant, of that which it has already once liquidated and satisfied in a legal way. There being no other Court to go to and believing the Federal questions involved enable this Court to protect it against this most extraordinary and oppressive result, the Defendant Bank appeals to this tribunal and asks it to reverse the judgment against it, and direct a judgment for the defendant on the record. By so doing the Supreme Court of the United States will not only do justice to the plaintiff in error, but declare that its authority on commercial law is worthy of the serious consideration of any inferior Court, especially where the subject matter involves also a construction of the laws of the United States.

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114-265

Supreme Court of the United States.

THE BOATSMEN'S SAVINGS BANK

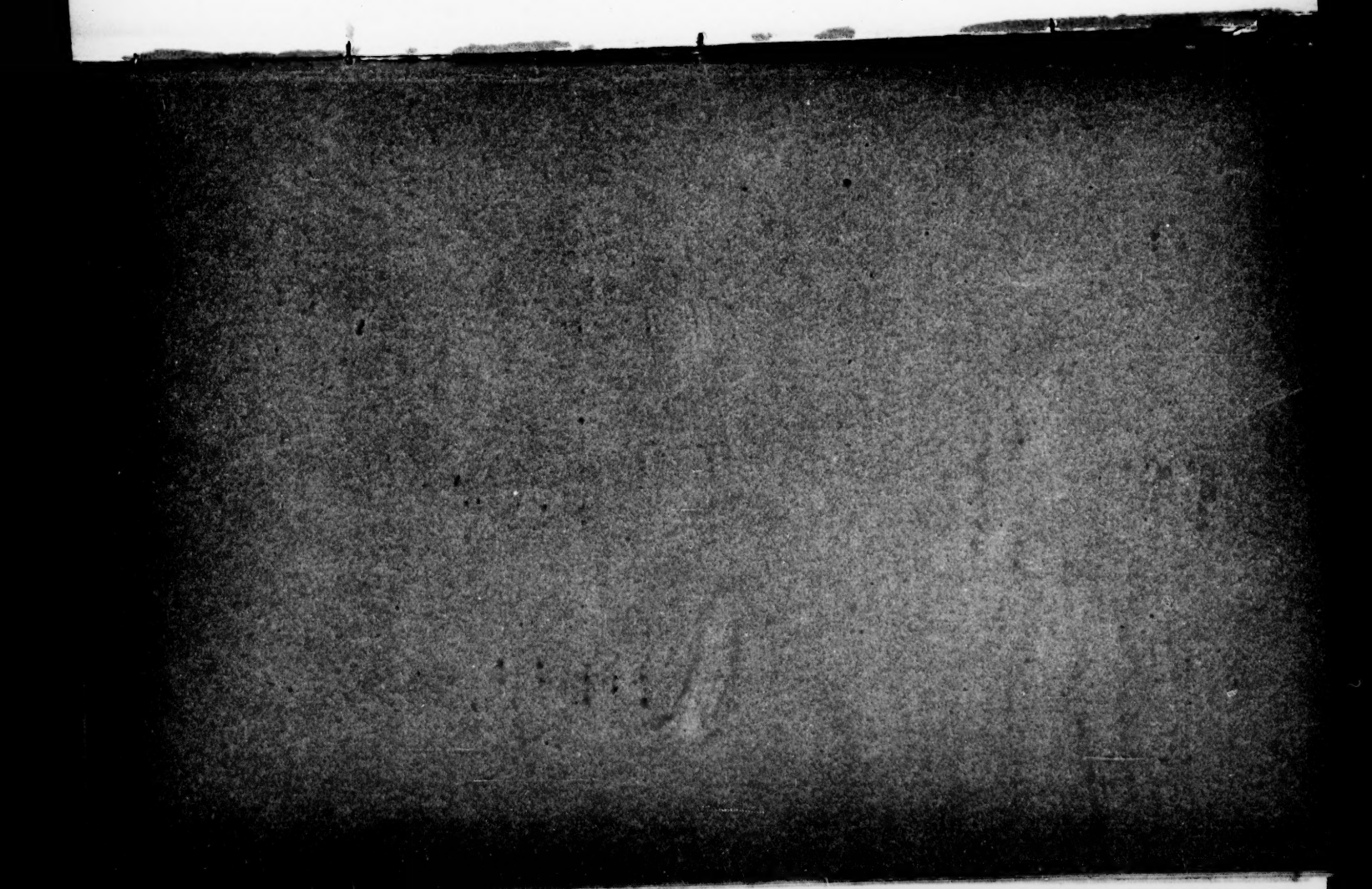
vs.

THE STATE SAVINGS ASSOCIATION OF ST. LOUIS.

No. 223.

W. HALLETT PHILLIPS,
Of Counsel for Plaintiff in Error.

R. O. POLKINHORN & SON, PRINTERS,



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THE STATE SAVINGS ASSOCIATION OF ST. LOUIS.

No. 223.

Brief of W. Hallett Phillips,

For Defendants in Error.

On October 25, 1874, W. S. Bartley drew a bill of exchange to his own order on Cobb, Delhonde & Co., at New Orleans, for $3,125.75, payable forty days after date, and on the same day endorsed and assigned the bill for value to plaintiff in error—the Boatsmen's Bank. The bill was accepted by Cobb, Delhonde & Co.

While the Boatsmen's Bank was the owner of the bill, about October 31, 1874, Cobb, Delhonde & Co. suspended payment, and on the same day notified the Bank. Soon after they were adjudicated bankrupts.

Cobb, Delhonde & Co. had at the time of their suspension a balance at the Boatsmen's Bank of $656.42. This was applied by the Bank as a credit on the Bartley acceptance, and the demand proved in the bankrupt court was only for the balance of the acceptance after deducting the credit. The claim was allowed and adjudged payable by said court only for that balance. Afterwards dividends were declared in the bankruptcy proceeding but paid on such balance only.

Section 5073 R. S., provides:

> "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be paid or allowed."

It is denied by the defendant in error, the Savings Association, that the amount due Cobb, Delhonde & Co. by the Boatsmen's Bank, was rightfully applied by that Bank, or that the case was one of mutual credits. They claim that the fund in the hands of the Boatsmen's Bank should have been paid over by that Bank to them. Their claim rests upon the following facts.

Cobb, Delhonde & Co., were depositors in the Savings Association. They drew two checks upon the Boatsmen Bank; one for $623.42, to the order of Ames & Co. and the other for $33, to bearer. The persons to whom these checks were delivered

endorsed them and presented them about October 23, 1874, to the *Savings Association* by whom they were cancelled and charged up to Cobb, Delhonde & Co., and credited to the parties by whom they were presented.

On October 31, the day on which notice was given by Cobb, Delhonde & Co. of their suspension, these checks were presented by the Savings Association to the Boatsmen's Bank. Payment was demanded, which was refused. Thereupon an action at law was brought on the checks by the Savings Association against the Boatsmen's Bank.

If the presentment of the checks established a liability on the part of the Boatsmen's Bank to pay over to the holder the amount due by that Bank to Cobb, Delhonde & Co., then the application of the credit and its allowance in the bankruptcy proceedings was erroneous; the money in point of law was due the holder of the checks and not Cobb, Delhonde & Co.

On the other hand, if no such liability was established by the presentment of the checks, then the Boatsmen's Bank had a right to treat the amount due by it as due Cobb, Delhonde & Co., and accordingly had the right to apply it toward the extinguishment of the amount due by that firm to the Bank, in other words they had the right to treat the case as one of mutual debts and credits within the meaning of the bankrupt act.

The suit was brought by the Savings Association in the Circuit Court of the city of St. Louis.

In that court there was a verdict and judgment in favor of plaintiff, which judgment was affirmed by the St. Louis Court of Appeals.

To reverse that judgment the present writ of error is prosecuted by the Boatsmen's Bank.

The St. Louis Court of Appeals is the highest court of the State in which a decision of the case can be had.

The Court of Appeals held that the right claimed by the Boatsmen's Bank under the bankrupt act, was not lawfully exercised, because that bank had illegally refused to pay the checks of Cobb, Delhonde & Co.; that the right of the Savings Association to payment was established by the presentment of the checks. "When the check was presented there was an equitable assignment of so much of the fund, which we have no doubt would have been recognized by the District Courts of the United States, administering the bankrupt act as being as valid in the absence of actual fraud, as if no bankrupt act had ever been passed." (R., 43.)

Whether the right of the plaintiff to the money was established by the presentment of the checks, is a question which must necessarily be settled by this Court for itself, in order to determine whether the right asserted by the defendant under the bankrupt act, was lawfully exercised.

In this respect, the case is analogous to that of *Factors Ins. Co.* vs. *Murphy*, 111 U. S., 740.

There the question was whether the defendant was protected in its purchase of the property under the bankruptcy proceedings. The plaintiff assailed the defendant's title, on the ground that the plaintiff was one of the co-owners of the property, and was not bound by the sale which had taken place in the course of a bankruptcy proceeding, for want of sufficient notice. The question of notice, this Court decided for itself, in order to determine the title of the defendant under the proceedings in bankruptcy.

The same point was decided in *Ray* vs. *Norseworthy*, 23 Wall., 128.

Whenever a dispute arises as to the right of a creditor under the bankrupt act, to apply an amount due by such creditor to the bankrupt in extinguishment of a debt due by such bankrupt to the creditor, a case is presented arising under the bankrupt act—that is to say, whether the debt was subject to be set-off, or, in other words, whether the case is one of mutual debts and credits under section 20 of the bankrupt act. (R. S., 5013.)

Libby vs. *Hopkins*, 104 U. S., 303.

In the case at bar, the judgment of the State Court was against the right asserted and exercised by the defendant under the bankrupt act. *This is all that is necessary to confer the jurisdiction.*

Crapo vs. *Kelly*, 16 Wall., 620.

Such right was expressly set up in the Court of Appeals.

The 12th assignment of error in that court, is "the judgment (of Circuit Court of St. Louis) was against the right of the defendant to a judgment in his favor, under the provisions of the act of Congress, providing for a uniform system of bankruptcy. (R., 39.)

If the court below is ~~right~~ correct in its position that the defendant had no right to apply the credit in its hands toward the extinguishment of the debt due it by the bankrupt, because of the presentment of the checks by the Saving's Association, then the judgment will have to be affirmed.

But, if the claim of the association by reason of the checks cannot be established, then the defendant lawfully exercised its right under the bankrupt act, and the judgment must be reversed.

The question controverted in the court below, is no longer an open one in this Court.

A check of a depositor in a bank does not transfer the debt or give a lien upon it to a third person until presented and *accepted*. The holder of a bank check cannot sue the bank for refusing payment of an unaccepted check.

Such is the established doctrine of this Court.

It rests upon the ground that the relation of banker and customer is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character.

Until acceptance, there is no privity of contract between the bank and the holder of a check.

Bank of the Republic vs. *Millard*, 10 Wall., 152;

First Nat. B'k vs. *Whitman*, 94 U. S., 345.

These decisions were pressed upon the court below, but disregarded on the ground that the question had been decided the other way by the local court in two decisions, which are referred to. The court say:

> "We are asked to review the doctrine of those cases and mainly, as we understand, on the ground that we ought to follow the ruling of the Supreme Court on commercial questions where the question is a vexed one, and has not been passed upon by the Supreme Court of the State. * * * After careful consideration, we have held that the action is maintainable. To say that our conclusion is one against which strong reasons may not be urged, is to say that the question is not a *vexata quaestio*, but it is a *vexata quaestio*. We shall neither examine nor discuss it again." R., 41–2.

We do not think there is any necessity for again discussing the general principle in this Court. It has passed from the region of controversy, and is now regarded as a settled rule of commercial law.

Its enforcement in this case will call for the reversal of the judgment below.

When the defendant bank applied the deposit in its hands toward the extinguishment of the debt due it by its bankrupt debtor, it did what it had a right

to do under the bankrupt law, notwithstanding the fact that the debtor had given the checks upon the defendant bank to the plaintiff, and that such checks were presented for payment

For a further discussion of the merits of the case, we refer the Court to the brief of Messrs. Noble & Orrick.

W. HALLETT PHILLIPS,
Of Counsel for Plaintiff in Error.

114-265

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Supreme Court of the U. S.

MARCH TERM, 1885.

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STATEMENT OF THE CASE BY, AND BRIEF FOR DEFENDANT IN ERROR.

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POINTS AND AUTHORITIES FOR RESPONDENT IN ERROR.

First. *A check is an appropriation of so much of the maker's funds in the bank on which it is drawn as is necessary to meet it*

Emery v. Hobson, 63 Me., 32.
Deaner v. Brown, 1 McArthur, 350.

Bromley v. Commercial National Bank, 9th Phila., 522.

In re Brown, 2 Story, 516.

Byles on Bills, Sharswood's edition, note to * page 21.

Georgia Nat. Bank v. Henderson, 46 Ga., 487.

Second. *The payee of an unaccepted check can maintain an action thereon against the bank having drawer's funds applicable thereto, but refusing payment.*

McGrath v. German Savings Institution, 4th Mo. Appeals, 330.

Senter v. Continental Bank, 7th Mo. Appeals, 532.

Third. *The St. Louis Court of Appeals is the court of last resort in the State of Missouri in this case.*

Missouri Constitution, Art. VI, Sec. 12.

Fourth. *The Federal question, the existence of which is the basis of the appeal, must appear on the record proper, or there is no jurisdiction in this court.*

Inglee v. Coolidge, 2 Wheaton, 363.

Walker v. Villavaso, 6th Wallace, 124.

a. It is not enough for the federal question to appear in the assignment of errors, or in the petition for the allowance of a writ of error.

Warfield v. Chaffee, 91 U. S., 1 Otto, 693.

Medbury v. Ohio, 24 Howe, 413.

Porter v. Foley, 24th Howe, 415.

b. It is not enough for the federal question to appear in a certificate of the judge of the State court.

Caperton v. Bowyer, 14 Wallace, 216.

Parmelee v. Lawrence, 11 Wallace, 36.
Insurance Company v. Treasurer, Id., 204.
Railroad Company v. Rock, 4 Wallace, 177.

c. Nor in the opinion of the Court, nor in the arguments of counsel.

Gibson v. Chouteau, 8 Wallace, 314.
Worthy v. Commissioners, 9 Wallace, 611.
Reed v. Marsh, 13 Peters, 153.
Ocean Insurance Company v. Polleys Id., 157.
City of Mobile v. Enslava, 16 Id.. 234.
Medbury v. Ohio, 24 Howe, 413.
Porter v. Foley, Id., 415.

Fifth. *It is not enough that a question of a federal nature was involved. It must have been actually and distinctly raised and decided adversely to the plaintiff in error in the State Court, or this Court has no jurisdiction to hear a writ of error.*

The Victory, 6th Wallace, 382.
Forney v. Towle, 1 Black, 350.
Hoyt v. Shelden, Id., 518.
1 Abbott's U. S. Practice, 1877, p. 330.
Hamilton County v Massachusetts, 6 Wallace, 632.

a. Where it appears that the decision of the State Court might have been based upon a ground raising the federal question, or upon an independent ground, and it was in fact based on the latter, or where it does not appear in such a case upon which ground the decision was based, and the independent ground is a good and sufficient one, jurisdiction will not be entertained by this Court.

Klinger v. Missouri, 13 Wallace, 263.
Gibson v. Chouteau, 8 Wallace, 314.

Ocean Insurance Company v. Polleys, 13 Peters, 157.
Crowell v. Randell, 10 Peters, 368.

b It must appear that without deciding the federal question the judgment as rendered could not have been given.

Brown v. Atwell, 92 U. S., 2 Otto, 327.
Murray v. Charleston, 96 U. S., 442.

c. The record must affirmatively show that the judgment in the State Court was founded on a decision of a federal question.

Cockraft v. Vose, 14 Wallace, 5.
Bank of West Tennessee v. Citizens' Bank, Id., 9.
Palmer v. Marston, Id., 10.
Sevier v. Haskell, Id., 12.
Steines v. Franklin County, Id., 15.
Kennebec Railroad v. Portland Railroad, Id., 23.
Hurley v. State, Id., 85.
Caperton v. Boyer, Id., 216.
Delmas v. Insurance Company, Id., 661.
Smith v. Adsett, 16 Wallace, 185.

d. Section 25 does not give jurisdiction to review decisions against mere assertions of authority under the United States. Hence when a party claims authority under a statute which, rightly viewed, does not purport to confer authority upon him, jurisdiction will not be entertained.

Dillinger v. Harttpee, 6 Wallace, 258.
Commercial Bank of Cincinnati v. Buckingham, 5 Howe, 317.
Mills v. Brown, 16 Peters, 525.
Scott v. Kelly, 22 Wallace, 27.

e. When the validity of a claim depends merely upon the construction of a treaty or statute, and not upon the validity of a treaty or statute, the decision of a State Court against such a claim is not subject to revision in this Court.

McDonough v. Millander, 3 How., 693.
Randall, &c., Railroad Company v. Marshall, 12 How., 165.

f. The Supreme Court has no jurisdiction unless the State Court decides *against* the privileges claimed under the act of Congress.

Gordon v. Coldcleugh, 3 Cranch, 268.
McClung v. Selliman, 6 Wheaton, 598.
McIntire v. Wood, 7 Cranch, 506.
Williams v. Norris, 12 Wheaton, 117.
Montgomery v. Hernandez, Id., 129.
S. P. Fulton v. McAbe, 16 Peters, 149.
Ableman v. Booth, 21 How., 506.
United States v. Bull, Id., 506.
Silver v. Ladd, 6 Wallace, 440.

g. In respect to the clause of section 25, which confers power to revise decisions against the validity of United States statute, it is held that when the decision of the State Court is in favor of the validity of the treaty, statute of or authority exercised under the United States drawn in question in the case, the Supreme Court has no power to revise its judgment.

Strodor v. Baldwin, 9 Howe, 261.
Linton v. Stanton, 12 Id., 423.
Colcite v. Stanton, 18 Id. 243.
Shaffer v. Scuddy, 19 Id 16.

Burke v. Gains, Id. 388.
Ryneal v. Thomas, 4 Wallace 603.

Sixth *It is not sufficient that the construction of the Statute was so drawn in question, and that the decision was against the title of the party, it must appear that his title depended upon the Statute.*

Williams v. Norris 12 Wheaton 117.
1 Abbots U. S. Practice 1877, section 95.
Hickie v. Starkie 1 Peters 94.
Verder v. Coleman, 1 Black 472.

a. The United States Supreme Court has not jurisdiction to revise a decision of a State Court against a title, right; privilege or claim under a statute of the United States, unless the title &c., is claimed *by the plaintiff in error* One who alleges title in an assignee in bankruptcy for the purpose of defeating the title of an other, but who does not claim the property in suite under the assignee, but adversely to him, cannot maintain the writ of error.

Long v. Converse, 91 U. S., 1 Otto, 105.

Seventh. *No point can be considered in an Appellate Court, which was not fairly brought to the attention of the inferior tribunal.*

Wilson v. The Life and Fire Insurance Co. of N. Y., 12 Peters 140.
Slocum v. Pomeroy, 6 Cranch 221.
Bell v. Brewer, 8 Howe 169.
Brochette v. do. 3 Id. 692.
Marine Bank v. Fulton Bank, 2 Wallace 252.

Eighth. The Section under which the counsel for the plaintiff in error claim the payment to the State Savings Association, would have been a fraudulent preference under the bankrupt act, is as follows:

Sec. 5128. "If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or siezed on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefitted thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and knowing that such attachment, sequestration, siezure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefitted. And nothing in said section five thousand one hundred and twenty-eight (thirty-five) shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan."

A, Section 5128, is designed to defeat a preference to a creditor, while the next is designed to defeat any transfer of property. To make a trasfer void the following facts must occur:

1st. The debtor making the transfer must be insolvent.

2nd. If the transfer gives a preference, it must have been made with a view to give a preference to the creditor.

3rd. In any event the person receiving the transfer must, at the time, have reasonable cause to believe the person making the transfer to be insolvent; and

4th. Must also know that such transfer was in fraud of the provisions of the bankrupt act.

5th. And the payment, pledge, assignment, transfer, or conveyance must be made within four months before the filing of the petition by or against the bankrupt.

Toof vs. Martin, 6 B. R. 49; S. C. 13 Wall. 40.
Foster v. Hackley & Sons, 2 B. R. 406; S. C. 2, L. T. B. 8; S. C. 1, C. L. N. 137.
In re Josiah DD. Hunt 2, B. R. 539; S. C. 1, C. L. N. 169.
Street v. Dawson, 4 B. R. 207; S. C. 1 L. T. B. 369.
Haughey v. Albin, 2 B. R. 399; S. C. 2 Bond, 244; S. C. 2 L. T. B. 47.
Scammon v. Cole, 5 B. R. 257.
Forbes v. Howe, 102 Mass 427.
Dow v. Sargent, 15 N. H. 115.
Rice v. Melendy, 41 Iowa, 395.

b. These things must concur. They must concur not only in fact but in time. The debtor must be insolvent, or contemplating insolvency, when the alleged preference is given, and he must then have in view the giving of a preference. The unlawful view to a preference must coexist with the preference. It is not enough that it precedes or follows the preference.

Clark v. Iselin, 9 B. R. 19; S. C. 11 B. R. 337; S. C. 10 Blatch. 204; S. C. 21 Wall. 360.

c. If the debtor did not intend to give a preference, and the creditor did not have reasonable cause to believe the debtor to be insolvent, the transfer is valid, although the debtor was then insolvent.

Mays v. Britton, 11 B. R. 229; S. C. 20 Wall. 414.

d. The payments which the section 5128 of the bank

rupt act declares void, are those which reduce the means of the debtor to pay his debts rateably. Neither a change of the form of his obligation from an account to a note, nor a mere accommodation endorsement can have that effect.

O'Conner v. Parker, 23 Mich. 22.

e. Section 5129, of the bankrupt act, is as follows:

"If any person, being insolvent or in contemplation of insolvency, or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or other disposition of any part of his property to any person who then has reasonable cause to believe him insolvent, or to acting in contemplation of insolvency, and knowing that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this title, or to defeat the object of or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this title, the sale, assignment, transfer, or conveyance, shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt."

f. A sale made by a debtor, under section 5129, of the bankrupt act, will be fraudulent if the following facts concur:

(1) If the debtor is insolvent, or contemplates insolvency or bankruptcy.

(2) If the purchaser, when he buys the goods has reasonable cause to believe the debtor to be insolvent, or to be acting in contemplation of insolvency.

(3) And knows that the sale was made by the debtor with a view to prevent, &c., or to defeat, &c., or to evade, &c., the provisions of the bankrupt act.

Babbitt v. Washburne, 4 B. R. 121.

6. B. R. 395; S. C. 1 Dillon 19.
Andrews v. Graves, 5 B. R. 297; S. C. 1 Dillon 108.
Bump on Bankruptcy, 10th. Edition 1877, p. 844.

g. A fair exchange of value may be made at any time, even if when the party to the transaction is insolvent. There is nothing in the bankrupt act, either in its language or its object which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing is conducted without any purpose to defraud or delay his creditors, or to give a preference to any one, and does not impair the value of his estate. His creditors can only complain if he wastes his estate, or gives a preference in its disposition to one over another. His dealing will stand if it leaves his estate in as good plight and condition as previously.

Cook v. Tellar, 9 Bar 19; S. C. 11 Bar 337; S. C. 21, 1st, Wallace, 360; S. C. 10th, Blackford, 204.

h. The uniform construction placed upon the bankrupt act by the federal courts, is that in order to make a payment between debtor and creditor fraudulent within the intent and pervue of the act, both parties must participate in the fraud. The creditor must know of the pending insolvency of the debtor, and must be aware, that he is obtaining a preference over other creditors.

Gillenwater v. Miller, 49 Miss. 150.
Grant v. National Bank, 97 U. S., 7 Otto, 80.
Lincoln v. Webster, 125 Mass. 249.
Fraser v. Thacker, 49 Texas, 26
Metcalf v. Officer, 1 McCrary, C. C. 325.

Matter of Dunhan, 2 Ben. 488.
Harrison v. Story, 5 Cranch 301.
Lock v. Manning, 3 Mass. 325.
Burns v. Billington, 1 Wash. 29.
Ogden v. Jackson, 1 Chancery N. Y. 370.
Barber v. Priest, 103 U. S 293.
Gurnsey v. Miller, 80 N. Y. 181.

Ninth. *If a check has been paid by a bank in due course of business, and in actual cash, or has been deposited by a customer and credit given him therefor, the bank stands in the position of a holder of the check for value.*

Morse on Banking, 2nd. Edition, p. 377.
American Bank v. Hartshorne, 3 Keys, 137.

Tenth. *A bona fide holder of a check for value, without notice, cannot be affected in his title by facts which may have been known to drawer and original payee.*

Harleck v. Craft, 4 Durer N. Y. 122.

a. As bad faith is not to be assumed but must be proved, the absence of proof on that point warrants the conclusion that the payment was made and taken in good faith.

Campbell v. Waite, 9 Ben. 166.

Eleventh. *In case of a fraudulent preference within the six months, the title acquired by transferee is not void, but voidable at the election of the assignee in bankruptcy.*

In re Josiah D. Hunt, 2 B. R. 539.
In re Hofer & Bros, (in re Beck) 1st B. R. 586.
Maltby v. Hotchkiss, 5 B. R. 458.
In re Arledge 1 B. R. 644.
Beck v. Parker, 65 Penn. 262.

Hobson v. Morrison, 1 Dillon, 421.
Reed v. Taylor, 4 B. R. 710.
In re Pierce and Harbridge, 3 B. R. 258.
In re J. S. Cohn, 6 B. R. 379.
Sedgwick v. Place, 1 B. R. 673.
In re Hawkins et al, 2 B. R. 378.
In re Broom, 3 B. R. 343.
Cragin v. Thompson, 12 B. R. 81.
Thrasher v. Bentley, 2 N. Y. Superior, 309.
McLain v. Meline, 3 McLain, 199.
McLain v. Jackson, 3 McLain 102.

a. The commission by the depositor of an act of bankruptcy does not revoke the power of the bank to pay his checks.

Morse on Banking, 2nd. Edition, pp. 278 and 279.

b. Nor insolvency deprive him of the power to make payments and to transfer his property.

Borland v. Phillips, 2 Dillon, 383.
Babbitt v. Waldron & Co. 6 B. R. 359.

Twelfth. *Section 5073, of the bankrupt act was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-offs did not previously authorize it.*

Sawyer v. Hoag, 9 B. R. 143.
Same Case, 17 Wallace, 610.

Thirteenth. *A debt to be the subject of a set-off must be due.*

Scogin v. Hudspitch, 3 Mo. 133.

Fourteenth. *A bank has no right to refuse to pay a depositors check because it holds an acceptance of the depositor not yet matured.*

Morse on Banking, 2nd Edition, p. 521.

Fifteenth. *On appeal from the highest State Court, this court is confined to an examination of the right title, claim or exemption set up by the party as depending upon the construction of the law or treaty, &c., of the United States under which it is claimed.*

Matthews v. Zane, 7 Wheaton, 206.
Montgomery v. Hernandez, 12 Wheaton 129.
Mills v. Brown, 16 Peters, 525.
Williams v. Oliver, 12 How. 111.
Smith v. Maryland, 6 Cranch 286.
Martin v. Hunter, 1st Wheaton, 304, 355.
1st Abbotts Practice 1877, p. (333.)
Money v. Porter, 4th Howe, 55.
LeGrange v. Chouteau, 4 Peters 287.
Western v. City Council of Charleston, 2 Peters 449.
Gill v. Oliver, 11 Howe, 529.

Jno M. GLOVER & SHEPLEY.

GEORGE H. SHIELDS,
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STATEMENT OF THE CASE BY, AND ARGUMENT FOR, DEFENDANT IN ERROR.

This was an action brought by plaintiff as the holder of two checks drawn by Cobb, Delhonde & Co. on defendant's bank, and which had been by mistake and inadvertence of a clerk of defendant marked with a cancelling instrument by plaintiff, supposing them drawn on plaintiff, but when the mistake was discovered, were presented to defendant, who then had greatly more of funds of Cobb, Delhonde & Co. on deposit than enough to pay said checks, but refused to pay because it had unmatured paper of Cobb, Delhonde & Co. which it feared might not be met at maturity.

The plaintiff filed its petition against the Boatmen's Savings Bank, in which it stated that defendant, on the 5th of September, 1874, and after, was a banking corpo-

ration in the city of St. Louis, and receiving deposits of money from those that chose to deposit with it; that there then existed a firm of Cobb, Delhonde & Co., and on the 23d day of October, 1874, said firm of Cobb, Delhonde & Co. drew its check on defendant, ordering and directing defendant to pay to H. Ames & Co. $623.42, which check said H. Ames & Co. indorsed and delivered to plaintiff; that on or about November 5, 1875, plaintiff presented the check to defendant and demanded its payment; that on the day of its presentation defendant had deposits of money belonging to them with defendant to a much larger amount than the amount of said check, but defendant refused to pay it to plaintiff, and that thereby it became liable to pay the amount to plaintiff, and for which, with interest from demand, plaintiff asks judgment.

For a second cause of action the plainsiff set up that said Cobb, Delhonde & Co., on the said 5th of September, 1874, drew its other check on the defendant for $33, payable to bearer, and it came into the hands of Laveille, Warner & Co., who indorsed and delivered it to plaintiff, and plaintiff, on or about November 5, 1874, presented the same to defendant and demanded payment thereof; that at the time of such demand the said Cobb, Delhonde & Co. had on deposit with defendant a much larger amount than said check, but defendant refused to pay it. Plaintiff asked judgment for amount and interest from demand.

The defendant, by its amended answer, after admitting the fact of the incorporation of the plaintiff and defendant, answered, substantially setting up that on the 3d of October, 1874, one Bartley drew his bill on Cobb, Delhonde & Co., at New Orleans, for $3,172.75, payable

40 days after date, to, and indorsed by the said Bartley, to defendant, which bill said Cobb, Delhonde & Co. accepted in writing; that before its maturity and on or about the 31st of October, 1874, they failed, and about that time notified defendant thereof in writing, whereby defendant was notified and given to understand, and was instructed, that no further payment was to be made by said Cobb, Delhonde & Co., nor by defendant, out of any funds held by it on any checks drawn on defendant; that after suspension the said firm never resumed payment, but were afterwards adjudicated bankrupts; that before suspension the holders of the checks sued on presented the same to plaintiff, and plaintiff voluntarily paid the checks and cancelled the same absolutely, and charged the amounts to Cobb, Delhonde & Co.

Defendant admits that after the firm's failure and said notification, said plaintiff presented said canceled checks to defendant and demanded payment which defendant refused, and denies that it was, or ever has been, liable to pay the same to plaintiff; that thereupon, with a view to settlement of the differences between plaintiff and defendant in relation to said checks, said defendant, at request of plaintiff, drew its certain cashier check, dated November 5, 1874, in favor of John R. Shepley, attorney of plaintiff, and acting for it, and it was understood and agreed by and between plaintiff and defendant that said check should be held by said Shepley, and said canceled checks should be held by defendant to await further advice as to their claims and liabilities in the premises; and if the said draft held by defendant on Cobb, Delhonde & Co. was not paid at maturity and said defendant should demand back said cashier's check, then said Shepley should indorse and deliver back said cashier's check to

defendant and defendant should return said checks of Cobb, Delhonde & Co., and plaintiff thereupon would make no further demand against defendant on account of said checks of Cobb, Delhonde & Co.; that said acceptance of Cobb, Delhonde & Co. was not paid at maturity, nor to any amount at any time except as stated; that upon maturity of said bill defendant notified plaintiff and said Shepley that it was not paid, and requested a return of the cashier's check, which said Shepley was then bound as aforesaid to re-deliver, but did delay until May 5, 1875, when he did, pursuant to said agreement, return said cashier's check to defendant duly indorsed, and defendant did return to him for plaintiff said canceled checks now sued on. Defendant states that afterwards Cobb, Delhonde & Co. were adjudicated bankrupts; that plaintiff, after return of cashier's check to defendant, made no further demand on defendant for the amount of said canceled checks, but defendant, relying upon said agreement, *credited the account* of Cobb, Dolhonde & Co. with defendant with the full amount of said canceled checks, and thereupon proved up their account against said bankrupt estate of Cobb, Delhonde & Co. for the balance; and but for that credit the whole amount of the acceptance would have been proved. That said Cobb, Delhonde & Co. were afterwards discharged in bankruptcy; by reason of which plaintiff is estopped from settling up the said claims against defendant.

Plaintiff filed a general denial to all the new matter set up in defendant's amended answer.

On the trial before the court, sitting as a jury, the genuineness of all the signatures to and upon the checks described in the petition having been admitted, the said checks were by the plaintiff offered in evidence; and be-

ing shown to witness Jos. M. Pettus, Jr., for plaintiff, he testified that in 1874 he was individual book-keeper of the State Savings Association, and that he presented these checks to the defendant on the 31st day of October, 1874; that he presented these checks to Mr. Lackland, who he afterward testified was president of defendant, and, telling him that they were not drawn upon our bank, asked him if he would not pay them; that Mr. Lackland told him that he did not think that they had the money. I told him that I had just come from the office, and Forester Delhonde (Mr. Delhonde's son), the man who drew the checks, told me that these checks had been cashed by the State Savings; that they had more than enough in the Boatman's to meet the checks; and then Mr. Lackland said they held paper of that house that was to mature in the South, and declined to pay these two checks. This presentation was made at the bank, to Mr. Lackland, on the 31st day of October, 1874, between half past nine and ten. The only reason he gave for not paying was that the Boatman's Savings Bank had paper of Cobb, Delhonde & Co., which was to mature. The plaintiff proposing to read the checks in evidence, the defendant claimed to cross-examine the witness. The witness testified that he knew he was correct as to the time of presentation, because that morning of the 31st of October, 1874, he had seen a copy of a letter stating the suspension of Cobb, Delhonde & Co., and upon that morning he began looking into their account with us, and found it overdrawn, and began to examine their checks drawn by Cobb, Delhonde & Co. on the State Savings Association, and found that, by mistake, the State Savings Association had cashed those checks which were drawn on the defendant; that wit-

came in with the checks. The witness went on to state that Mr. Greely, who was a director in both banks, had a conversation with Mr. Parsons, president of plaintiff, who was anxious that the defendant should issue a cashier's check to Mr. Shepley, and take up the checks and charge them on the books of the bank. Another thing was that probably Bartley's acceptance might be paid. If so, Shepley was to hand cashier's check to the State Savings Association. If not paid, he was to return it to defendant. We gave Mr. Shepley such a check and then it stood for six months. Some time before I went to Mr. Shepley with these cancelled checks which Mr. Shepley had given to us, and told him that we would take our checks. This cashier's check was dated 5th of November, 1874, and was issued to Mr. Shepley. He handed me the check indorsed by him and said he had no claim against us; that the matter was ended. The words used by Mr. Shepley when he received the check were, "If the acceptance was paid, this check must be handed to the State Savings. If not paid, he was to return it to us" Don't recollect any question of law spoken of.

On Cross-Examination, witness said:

"When I got the cashier's check from Shepley I returned to him the two canceled checks. When Shepley had given up to me our cashier's check and I had given to him the canceled checks, we were exactly as we had been before. The understanding was that we were to give up to Shepley upon his delivering to us the cashier's checks. I told Shepley we had received nothing from the acceptance, and I would take the checks." The witness said again that cashier's check was put in Shepley's hands, and if Bartly paid his draft, he was to return the

check to the State Savings, and if it was not paid, the check was to be returned to the bank, and the understanding was that they were to return to Shepley the checks; and much more of the same sort.

CARLOS S. GREELEY testified at great length, being called with a view of showing that some agreement had been made by the plaintiff and defendant that the question of liability to pay the checks should be, and was, left to J. R. Shepley to determine; but as the court found that no such agreement was made, and no pretense was made that Mr. Shepley ever decided it, no further attention will be given to that matter here.

The defendant here rested his case, and the plaintiff, in rebuttal, introduced from the individual ledger of defendant the entry upon that book at the account of Cobb, Delhonde & Co., as follows: "Two checks; numbered 34 and 102, for $33 and $323.42 presented and payment refused after failure of Cobb, Delhonde & Co., but now paid to John R. Shepley by our cashier's check, No. 2,078, which he is to hold for the State Savings Association in the event of our not demanding the same from him for our own use." Then is a memorandum, "see credit below, book not balanced, but account current made out and sent to Cobb, Delhonde & Co., April 10, 1875. See letter check with letter C, 1874, waiting usual book balancing." Then follows another note on the same page, "see charge above; our cashier's check returned to us by J. R. Shepley on delivery to him of Cobb, Delhonde & Co.'s two checks above referred to."

CHARLES PARSONS, president of plaintiff, was examined on its behalf, and stated in substance that he found, on 31st October, 1874, that account of Cobb, Delhonde & Co., appeared overdrawn on plaintiff's books to between

$600 and $700, and on examination to find how it occurred, found that there were two checks in our hands that had been drawn on the Boatmen's Savings Bank, and had been by mistake charged up to the account of Cobb, Delhonde & Co. with us; and I told the teller to take them to defendant for payment.

He gave further testimony in regard to conversations with Mr. Greeley; denied making any agreement in regard to arbitration about these checks; stated that the agreement was that cashier check was to be given to Shepley to be held by him to see whether the draft and acceptance of Bartley should be paid at maturity, and the checks should be given to the Boatmen's Savings Bank If the draft was paid, then Shepley was to return said cashier check to the Boatmen's Savings Bank which was to give back to Shepley for the plaintiff the said checks of Cobb, Delhonde & Co. upon Boatmen's Savings Bank now in suit, when the parties should stand just as before; that he gave no other instructions and no authority beyond this to Mr. Shepley; and gives account of the marks of the canceling instrument on the checks in suit.

JOHN R. SHEPLEY was examined at considerable length, and testified to the agreement under which he received the cashier's check substantially as testified to by Messrs. Parsons and Lackland; had no authority from State Savings Association to make any agreement on its part except to receive from the defendant its cashier's check and surrender the checks described in the petition, and if the Bartley acceptance was paid at maturity, he was to hand said cashier's check to plaintiff; if not paid, he was to hand cashier's check back to Boatmen's Savings Bank and receive these checks now in suit; know of no

agreement about any question being left to his decision; was not authorized by plantiff to enter into any such agreement, and never made any decision. Upon demand of Mr. Lackland to surrender the cashier's check and upon satisfying himself that the Bartley draft was not paid to defendant, he surrendered the cashier's check and received from defendant the two checks described in petitition. Was some time after ordered to commence suit against defendant on these checks by the plaintiff.

The court gave the following instructions asked by plaintiff.

"1. If the court find that the checks given in evidence by plaintiff were canceled by mistake, then such cancellation will not prevent recovery in this action.

"2. Unless the parties to this suit agreed to submit to John R. Shepley the question of the liability of defendant to plaintiff on checks in evidence, and that said Shepley did decide that there was no liability on the part of defendant to plaintiff for said checks, then the defendant has made out no defense to this action."

"3. If the court find from the evidence that the cuttings and marks upon the checks given in evidence by plaintiff were made by mistake and inadvertence, by the clerk of plaintiff, said clerk believing at the time that said checks were drawn upon the plaintiff, then said cuttings and marks in no way affect said checks, or either of them."

The court gave also the following instructions asked by defendant:

"6. If the court finds from the evidence that after presentation by plaintiff of the checks in question, and refusal of defendant to pay same, it was agreed be-

tween the parties to issue to J. R. Shepley the cashier's check of defendant for the amount of checks in question, and hold said checks in question with the understanding that said Shepley should inquire as to the legal liability of defendant, and also await the event of payment or non-payment of the Bartley draft on its maturity, and if said draft was not paid, and said Shepley determined the defendant was not liable on the checks in question, he should return to defendant its cashier's checks, receiving back said checks in question, and the plaintiff should abandon all claim against defendant; that said draft was not paid in due time and said Shepley, on request, did return the cashier's check and declare to defendant he had no claim on it, and that the matter was ended—then the court declares the plaintiff cannot recover in this action, and finding must be for the defendant."

The court refused to give the following instructions asked by defendant.

"2. If the court finds from the evidence that the deant refused payment of each of the checks described in the petition on presentation and demand, then this action cannot be maintained by plaintiff against the defendant, and the finding must be for the defendant.

"3. The court declares that if before either of the checks described in plaintiff's petition was presented by plaintiff to the defendant and payment thereon demanded, the drawers had notified the defendants that they had suspended payment, then the plaintiff cannot recover in this action.

"4. If the court finds from the evidence that each of the checks described in the petition was first presented

to the plaintiff, and the amount thereof paid or credited to the holder, and the checks then and there canceled by the plaintiff and the amount thereof charged as a debt to the drawers on their open account with plaintiff, on the books of the plaintiff, then it is declared such action of the plaintiff was a payment of such checks, and this action cannot be maintained by plaintiff against defendant thereon, or because of the possession thereof.

"5. If the court finds from the evidence that each of the checks described in the petition was first presented to the plaintiff and the amount thereof paid or credited to the holder, and the check then and there canceled by the plaintiff and the amount thereof charged as a debit to the drawers, or to their open account with plaintiff on the books of the plaintiff, and that while such check still bore the evidence of its cancellation on its face, and said debit to the drawers on plaintiff's book still remained, the plaintiff presented the checks to defendant and demanded payment, then it is declared the defendant was not bound to pay same, and the finding must be for the defendant."

"7. If the court finds from the evidence that upon the presentation by plaintiff of the checks in question, and refusal by defendant to pay same, the defendant claimed the right to apply the deposits of Cobb, Delhonde & Co. in the defendant's bank on the Bartley draft accepted by Cobb, Delhonde & Co., then having suspended payment; as the parties knew, and thereupon, at request of plaintiff, the defendant issued its cashier's check to J. R. Shepley for the amount of the checks in question, and received the checks in question with the understanding had between the parties at the time that if said draft and acceptance was not paid in due time, the cashier's

check should be returned by Mr. Shepley to defendant and the checks in question to plaintiff; that said draft and acceptance was not so paid, and on request the said cashier's check was returned by Mr. Shepley, with the consent of the plaintiff, to defendant, who then and there returned to Mr Shepley for plaintiff the checks in question, and it was then known to the plaintiff and said Shepley that defendant's object was to apply the amount of deposits of Cobb, Delhonde & Co., equal to said cashier's check, as a set-off on said unpaid draft and acceptance, and said defendant did proceed to apply the amount aforesaid in part payment of said acceptance, and the acceptors, having been adjudged bankrupt, proved up the defendant's claim for only the balance of acceptance, and thereon only received dividends, and said bankrupts have been duly discharged, and plaintiff did not again assert its claim on the checks in question against defendant until this suit was brought, then the court declares the plaintiff acquiesced in the appropriation of said deposits by defendant under his claim at the time made, and cannot maintain this action."

To the giving of the instructions asked by plaintiff by the court, and to the refusing of the instructions asked by the defendant, which were refused, the defendant excepted at the time.

Thereupon the court found a verdict for the plaintiff and entered up judgment for the amount of the said checks.

Defendant in due time filed the usual motion for new trial, which was refused, and it appealed to the St. Louis Court of Appeals, which affirmed the judgment, whereupon it sues out a writ of error to this court.

ARGUMENT.

I.

There are two classes of cases affecting the right to recover on the checks held by the respondent in error, independent of any federal question in the record. The former holds that a check is an appropriation of so much of the maker's funds in the bank on which it is drawn as is necessary to meet it. The other class seems to hold that the reverse is the true doctrine; but, upon an examination, the cases cited nearly all turn out to be cases in which the instrument in question was not a check, but a draft or bill of exchange, as will be seen by an examination of the authorities cited in the brief of the plaintiff in error, section 1, page 9.

The cases cited to the contrary in this brief are cases in which the written instrument is a check, and the doctrine is mostly founded upon an implied contract, based upon general usage and understanding sufficient to amount to a contract between the bank and the drawer of the check, that it will pay the check to the payee named therein, upon which promise made for the benefit of the third person, to wit: the payees the latter can sue, and it is held that upon presentment the check becomes an appropriation of the amount of money named therein.

II.

Under the State Constitution of Missouri, Revised Statutes 1879, page 71, article 6, section 3d, the St. Louis Court of Appeals is made the court of final resort for this case. It is unnecessary to recur to the case of Mandeville v. Welch, 5 Wheaton, 277, or the case of Harris v. Clark, 3 Comstock, 93; of Fogartie v. The State Bank, 12 Rich, 518; of Vanbibber v. The Bank of Louisiana, 14

Louisiana Annual, 481; of Munn v. Buck, 25 Ills, 35; of Bickford v. First National Bank of St. Louis, 42 Ill., 238; of Chicago Marine and Fire Insurance Company v. Stanford, 29 Ill, 168; of Roberts v. Corbin, 26 Iowa, 315, to establish this doctrine. All these are cases which give the payee of the check the right of action; and in Morse on Banking, 2d edition, pages 525 to 537, there is an exhaustive review of the subject, which gives the principles on which the right of action is maintained, and criticises and overturns the reasoning of a few adverse cases. All these cases, though directly in point, are believed to be unnecessary, for the reason that the case of McGrade v. The German Savings Institution, 4th Mo. Appeals, 330; of Senter v. The Continental Bank, 7th Mo. Appeals, 532, and of the Court of Appeals in this case, will be followed by the Supreme Court of the United States upon the question of commercial law involved. It would be immaterial, if true, that the Supreme Court of Missouri had held that the payee of the check could not sue. To overturn the decision of the Court of Appeals in this court, and to establish the doctrine of the Supreme Court in this case, would be simply to grant the plaintiff in error an appeal to the Supreme Court of Missouri, which is denied by the Constitution of that State. In the case of Mandeville v. Welch, the doctrine upon which the latter cases are founded is foreshadowed in the following words;

"Where an order is drawn either on a general or a particular fund for a part only, it does not amount to an assignment of that part or give a lien as against the drawee, unless he consents to the appropriation by an acceptance of the draft, *or an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties as a part of their contract.*"

In the case of Vanbibber & Co. v. The Bank of Louisiana, *supra*, it is expressly laid down:

"The bank becomes the agent of the debtor to pay the check. In accepting the agency, which is for a consideration, they subject themselves to the rules and obligations of agents and can be sued directly by the holder of the check."

In the case of Munn v. Birch, 25 Ill., it is held that:

"What is called commercial custom or usage enters into and forms a part of every contract to which it is applicable. Where a custom is so universal and of such antiquity that all men must be presumed to know it, courts will recognize and act upon it."

"Such is the custom governing checks on bankers. The general rule is that the creditor cannot divide up his demand against the debtor and require the latter to pay it in parcels, but everybody knows, and courts no less than commercial men, that an exception to this rule exists as to deposits in bank; that according to universal custom, the mere opening of a bank account implies a contract on the part of the banker to allow the depositor to withdraw it in parcels."

The Court then proceeds to say, that the custom is to recognize the title of the holder of the check and his complete right to withdraw the money by the partial assignment of it expressed by the check, and says:

"To say that the holder of a bank check has not both a legal and an equitable right after presentation of the check to the money of the drawer in the hands of the banker, would destroy the most valuable feature of bank deposits and checks. * * * Surely every sound lawyer would at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker on the one side, and the receiving of the check for value and presenting it on the other. * * * We hold then, that the check of a depositor upon his banker, de-

livered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery, and when presented to the banker he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the party drawing the checks has funds to that amount on deposit, subject to his check at the time it is presented."

Further on in the opinion the Court says there was an equitable, if not a legal, assignment and transfer of the amount named in the check, and proceeds to give judgment upon that doctrine without determining, and in effect holding it immaterial, whether the assignment was legal or equitable. The case of McGrade v. The German Savings Institution, *supra*, goes into a rather searching examination of the authorities on this subject, and bases the opinion upon the contract between the bank and its depositor implied from the universal usage or custom of the business world. It calls attention to the cases of Fogarty v. The State Bank, 12 Rich, 518; Lester v. Given, 8 Bush, 357, as affirming the right of action on the check, and quotes the Bank of the Republic v. Millard, 10 Wallace, 155, and the case of The National Bank v. Elliott Bank, the American Law Journal of November, 1857, page 511, as the only cases in this country on the other side.

As before stated, most of the authorities cited by plaintiff in error, under the first and second subdivision of its third point, are cases of drafts and bills of exchange, which are entirely differentiated under this doctrine from the checks. Referring first to the Missouri cases, we find that the Bank of Commerce v. Bogy, 44 Mo., 17, was a case of a bill of exchange and not of a check; that in the case of Ford v. Angelrodt, 37 Mo., 57, the

instrument in suit was also bill of exchange; and the case of Kimball v. Donald, 20 Mo., 577, was also bill of exchange; but it is stated in this case, in effect, that a bill will operate as a transfer of the fund in equity *if such was the intention of the drawer*, which reasoning applied to checks will sustain our view of the right of action of the holder of the check. In the case of Clements v. Yeates, 69 Mo., 623, it was held that a payee of a draft could not sue the drawee. This was an action upon the draft and upon nothing else, and therefore differs both from an action on a check and from an action to recover a portion of the fund on the theory of an equitable assignment.

The Court of Appeals in the case of McGrade v. The German Savings Institution, states that the Missouri cases cited by the plaintiff in error, Knecht, administrator, v. U. S. Savings Institution, 2 Mo. Appeals, 563, did not consider the point involved in this case and in no way affects the present question (page 337). To proceed to the cases from the Supreme Court of the United States, cited in the brief of the plaintiff in error, to the effect that the payee of an unaccepted check cannot sue the bank, we find the reasoning of the case of the Bank of the Republic v. Millard very strenously attacked in Morse's fine work on Banking, 2d edition, pages 525 to 537. Apparently, however, Morse assigns too radical an effect to that case. All that it decided or was intended to decide was that *in a court of law* such an assignment as a check upon a general fund would not be recognized. This very clearly appears from the decision of Judge Miller, who concurred in that opinion in the case of the First National Bank v. Coates, volume 16, Weekly Cincinnati Law Bulletin, page 609. So in Walker v. Siegel,

2 Law Journal, 508, Judge McCrary states his view of the effect of that decision when he says that such an order, as soon as notice is given to the drawee, works an assignment in equity. The argument of Morse above referred to in his second edition, appears on page 459 of the first edition. Morse says that in Mandeville v. Welch, "the Court touches for the first time the key-note of the true contrary doctrine." Daniels on Negotiable Instruments, chapters 10 and 11, support the authority of the holder to sue on the check. Notwithstanding this large confirmation of the soundness of the doctrine, it is believed that the case of McGrade v. The German Savings Institution, and Senter v. The Continental Bank, with the decision in his case, are sufficient to sustain the judgment here independent of the views of the Supreme Court of Missouri, and independent of the views of every other State.

To examine plaintiff in error, references to the decisions of this Court in the case of the Bank of the Republic v. Millard has been considered. On an examination, the case of Marine Bank v. Fulton Bank appears to have no effect on, or reference to, the question here at issue, and the same may be said of Thomas v. Riggs, 5 Wallace, 663. The case of the First National Bank v. Whitman, 94 U. S., 393, decided upon the authority of the Bank of the Republic v. Millard that the payee of a check unaccepted cannot sue a bank, but this we believe is going further than did the Bank of the Republic v. Millard. The case of Libby v. Hopkins, 104 U. S., page 303, is no authority whatever upon this proposition.

III.

There is no jurisdiction in this Court, because no fed-

eral question appears by the record. The federal questions sought to be invoked are two in number—*first*, the proposition that to grant an action to the payee on the check was in effect a decision against the right of set-off secured to the debtor of a bankrupt by section 5,073 of the Bankrupt Act; and, *second*, that by reason of the notice of Cobb, Delhonde & Company, of date of October 31, 1874, which the plaintiff in error claims to have been a suspension of payments, and an act of bankruptcy followed, by proceedings in bankruptcy and final discharge, the fund in the hands of the plaintiff in error was protected from the operation of the check held by defendant in error, and that to decide otherwise is to create a federal question. The question now arises, where do the so called federal questions appear? They must appear in the record, because that neither the assignment of errors nor the petition for the allowance of a writ of error, nor the certificate of the Judge of the State Court, nor the opinion of the Court, nor the arguments of counsel can be looked to, for evidence of such a federal question is well established. Yet when plaintiff in error comes to attempt to point out the federal question, it can only indicate (1) the petition for writ of error, (2) the amended answer setting up only the existence of an unmatured acceptance of the drawer of the check held by the plaintiff in error at the time of the presention of the check in suit, the suspension of the drawer of the check on the 31st of October, 1874, and notice thereof to the plaintiff in error before delivery of the cashier's check to the plaintiff in error, John R. Shepley, to hold in escrow, and its return to plaintiff in error upon the dishonor of the aforesaid acceptance; that thereafter the plaintiff in error refused to pay the checks in suit when

presented, credited the drawer with the amount of the deposit and proved the balance in proceedings in bankruptcy, and that the transaction which Shepley, coupled with the proof only of the difference between the deposit and the dishonored draft, amounts to an estoppel on the defendant in error. The application for writ of error cannot be considered at all. The only question then remaining is, does the answer show a federal question? That it does not, is plain to our mind. The answer attempts to treat the notice of December 31st, 1874, as a countermanding of the payment of the check, the effect of which, if there was any such countermanding, is a question purely of State law. The mention of the proceedings in bankruptcy only comes in as incident to and part of the state of facts relied on to establish an estoppel, and the question of the right of set-off under the bankrupt act was a question simply between the plaintiff in error and the assignee, and was *res inter alios acta* so far as we are concerned. The plaintiff in error admits, on page 15, that a State Court has the right to determine for itself a decision of commercial law, and the same cannot be reviewed in this court. We say, the question of set-off between the assignee and the plaintiff in error is a matter with which we have no concern, but the plaintiff in error coolly disposed of this vital point in the case, with the bare declaration that it makes no difference "whether the set-off claimed in this suit, or is proved to have been legally made in the Bankrupt Court and allowed, and that disposition of the fund brought here as a defense." For this proposition of course there is a significant lack of any citation of authority.

IV.

That no question of a federal nature was actually and distinctly raised in this case is very evident. That was an afterthought, apparently first occurring to the mind of the plaintiff in error after the decision of the Court of Appeals. Is it possible for this court to say that such a federal question was decided against the plaintiff in error? Was it decided that it had no right of set-off between it and the bankrupt? The court in its opinion decides the question of commercial law and gives the payee a right to sue. It ignores the assumed back-relating title of the assignee in bankruptcy and the pretended importance of the question of set-off, and simply decided the case on the commercial proposition, fully sustained by citations hereinbefore that the payee of a check gets title to the fund covered by the check by presentation to the bank. "The right of the plaintiff to this money was established on the day of the presentation of the check;" the court says: "When the check was presented there was an equitable assignment of so much of the fund," says the court, and it contemptuously dismisses all other questions as immaterial. The question of the right of action on the check, and the question of the weight of evidence on the subject of estoppel, are the only ones considered. Therefore we say that there was no federal question decided adversely to the plaintiff in error in the State Court, and this court has no jurisdiction to hear this writ of error.

It appears that the decision of the State Court not only might have been, but was based upon a ground independent of any alleged federal question, and therefore jurisdiction will not be entertained.

At the most, the plaintiff in error simply makes an empty assertion, that having claimed that a federal question was involved, this court must therefore entertain jurisdiction. Supposing the plaintiff in error honestly misconstrued the Federal Statute on bankruptcy, and acted according; still no power lies here to review the decision, as the Statute rightly viewed does not purport to confer any authority upon him which would be material to the defense of this cause. (See cases cited under point 5th. D in our brief in this case.) Where the validity of a claim depends merely upon the construction of a Statute and not upon its validity, this court cannot review the decision of the State Court. (See point 5th. E page 5, our brief in this case.)

There is certainly no pretence in this case that the validity of the bankrupt act was in question. There could, therefore, be only a question of its construction and such a question is no foundation for the writ of error, *unless the title of the plaintiff in error depended upon the Statute.* (See 6th point in our brief in this case.) To clinch this matter a reference to the case of Long v. Converse, 91 U. S. 1 Otto, will show that the plaintiff in error in this case can maintain no writ of error for the reason that it alleges title in the assignee in bankruptcy and not in itself; that it holds, or claims to hold, adversely to the assignee and not under him. This explodes the whole proposition of the curious plea that because the drawer of the check went into bankruptcy two months later, the money covered by the check belonged to his assignee two months before he was appointed.

V.

It is believed that only the ingenuity and ability of the learned counsel on the other side redeem from abso-

lute absurdity the proposition that section 5073 of the bankrupt act has anything to do with this case. The discussion of the authorities under heading No. II of this argument sufficiently show that on the date of the presentation of the check in suit the respondents in error became the owner of so much of the fund as was covered by the check, and the only thing that could be set off by the plaintiff in error against the assignee in bankruptcy would be the dishonored acceptance against what remained of the deposit after deducting the amount of the check of the respondent in error.

VI.

There may perhaps be somewhat more of substance in the contention that, by reason of section 5128, against fraudulent preferences, the plaintiff in error had, under the bankrupt act, an excuse for not paying the check, on the ground that not to do so would give the respondent in error a fraudulent preference under the bankrupt act. By examining, however, section 528 and the authorities cited under point 8th of our brief in this case, it will be seen that a question of fact arose and not a question of the validity of that section. The section is conceded to be valid. An erroneous construction of it by the State Court is not subject to review here, unless the title of the plaintiff in error hung upon the Statute at most. We have seen that the plaintiff in error claimed no title under the Statute, but simply claimed that the title was not in the respondent in error by virtue of the presentment of the check; but that at the time of the presentment it was bound to hold the amount covered by the check for the benefit of the subsequently appointed assignee in bankruptcy. Under the doctrine of Long v. Converse, *supra*, this position is a fatal objection to the

jurisdiction. Next, no question even of the construction of the Statute has arisen by this contention. but simply a question of fact. The bank would only be justified in refusing to pay the check *for this reason*, upon the existence of the following state of facts; that Cobb, Delhonde & Company were insolvent at the date of the giving of the checks; that the giving of the checks was done with a view to give a preference to the creditor; that rhe creditor, to-wit: the party presenting the check, had reasonable cause at the time of receiving it to believe the drawer of the check to be insolvent, and *knew* that the transfer was in fraud of the provisions of the Bankrupt Act. Unless these facts are established affirmatively on this record, it does not lie in the mouth of the plaintiff in error to urge them as an excuse for the non-payment of the checks. In point of truth none of these facts appear. At the giving of the checks the maker was doubtless solvent, at least nothing appears to the contrary. That the respondent in error had no notice of any insolvency sufficiently appears by the cashing of the check without inquiry, and the evidence as to when notice was first communicated, which was about the date of the notice by the plaintiff in error. Next, there is no evidence that the check was originally given for the purpose of giving a preference. There could be no such purpose known to the respondent in error, as its utter ignorance of the consideration of the original check, which he took as an assignee for value is completely proved by its conduct in the premises, it thought the check was on itself, and cashed for the holder. Next the respondent in error could have had no reasonable cause to believe the maker of the check insolvent as is evi-

dent from tho same state of facts and its action in taking the check at all. The evidence conclusively proves that the respondent in error was an assignee for full value without notice, and if the intent to give a preference were known to the original payee and not known to the respondent in error, its title on the check would be good, although the original payee's title might be defeated under section 5128. (See point 8 of our brief in this case). It makes no difference whether the drawer of the check was actually insolvent at the giving of the check, unless the respondent in error had reasonable cause to believe him insolvent. See point 5 C. of our brief in this case).

Section 5129, of the bankrupt act prescribes the conditions under which a sale of property shall be held void. (See point 5th, E. and F. of our brief in this case). The Court will agree with us that there is no evidence whatever upon the point of whether the check in suit was given to Henry Ames & Co., as a payment on account of preceding indebtedness, in which case it was possible for it to be a preference, or whether it was given for a purchase of goods which simply turned the bankrupt's assets from money in bank to an equivalent value in goods in which case the transfer would be valid, and the check good in the hands of Ames & Co., and of course, in-dubitably good in the hands of their indorsee, the respondent in error. In other words, for all the record shows, the state of facts attending the giving of the check to the original payee may have been such as to absolutely preclude the possibility of the transfer being an invalid one, or the possibility of raising the question of an invalid preference. Under these circumstances the plaintiff in error utterly and totally fails to make out any

state of facts which would protect him from paying the the check on the theory of an unlawful preference.

There is one consideration which makes the discussion of this proposition entirely superfluous, and that is that the respondent in error having paid the check in cash, or having received it for deposit and given the customary credit therefor, stands in the position of the holder of the check for value, (see point 9th. of our brief in this case,) and as such its right of action could not be defeated, even though a right of action on the check might have been defeated if brought by the original payee under circumstances of guilty preference under the bankrupt act. (See point 10th. of our brief in this case.) And absolute good faith is to be assumed in the absence of proof to the contrary. (See points 9th. and 10th. *a* of our brief in this case.)

VII.

There is another proposition advanced by the plaintiff in error which extorts renewed admiration at its boldness in confronting the adjudicated cases. That is the theory, that if there is a payment constituting an unlawful preference under the bankrupt act, the title remains in the assignee and does not pass to the transferee, and therefore by application of that doctrine to this case, the money covered by these checks in suit did pass to the assignee in bankruptcy, because the fraudulent preference was void. There is no such law from the letter books to the last bankruptcy report. The title acquired by the transferee is not void, but voidable at the election of the assignee. The assignee has two remedies. He may sue the bank which pays out the money with knowledge and under all the conditions required to make

out the guilty payment of a fraudulent preference, and recover the amount paid, or the assignee may sue the party who received the fraudulent preference for so much money held to his use in violation of the bankrupt act. But the title to the property passes to the transferee and therefore it could not be held, as contended by the respondent in error, that after the date of the presentation of these checks it held the money covered by them for the use of the assignee, and therefore the amount of money covered by the check could not be taken into consideration upon the adjustment of mutual credits, or set-off between the plaintiff in error, and, the assignee in bankruptcy under section 5073. The doctrine of the law is very clear, (see point 11th. of our brief in this case), that the title passes to the transferee and the transferee's title can only be avoided by the assignee in bankruptcy, which the assignee in this case has never done.

VIII.

The plaintiff in error in this case seems to be under the impression that if the drawer of the check was insolvent at the time of its presentation, to the knowledge of the bank, it was the duty of the bank, in view of the possibility of subsequent bankruptcy proceedings, to refuse to honor the check. Nothing could be more remarkable, unless indeed it were some of the preceeding propositions of the plaintiff in error. The commission by the depositor of an act of bankruptcy does not revoke the power of the bank to pay his checks without legal liability, (see point 11th. A. of our brief in this case), nor does insolvency deprive him of the power to make valid payments, or to transfer his property.

Borland v. Phillips, 2 Dillon, 383.
Babbitt v. Waldron & Co. 5 B. R. 359.

In the absence of actual fraud in the transaction, the mere insolvency of the drawer of the check is of no moment. (See point 5th. *b.* and *c.* of our brief in this case.)

The authorities of Vernon v. Henkley, 2 T. R. 113, and Mathew v. Sherell, 2 Taunton 439, cited by the plaintiff in error, upon page 25 of its brief, to the effect that the act of suspension was an act of bankruptcy, are English cases, depend on the English Statute, and do not apply in our country. (See Morse on Banking, 2nd. Edition, pages 278 and 279.)

IX.

It will not be contended that a bank which held an immatured acceptance of a depositor could refuse to honor the check of that depositor on his current bank account prior to the maturity of the acceptance. A debt to be the subject of a set-off must be due, according to the familiar rule on this subject, and section 5073 of the Bankrupt act was not intended (see point 12th of our brief in this case) to enlarge the ordinary rules pertaining to the subject of set-off. The assumed desire to protect the assignee in bankruptcy tallies ill with the delivery of the cashier's check of the plaintiff in error to John R. Shepley for the use of the respondent in error should the acceptance of Cobb, Delhonde & Company be paid at maturity. This simple fact will cause the case to laugh in the face of counsel who pretended a solicitous interest for the protection of the assignee in bankruptcy, or denied that the only purpose of refusing to pay the checks of the respondent in error was to make that much money for the use of the plaintiff in error on account of the

debt not yet due, owed to it by the drawer of the checks, That a bank has no right to refuse to pay a depositor's check, because it holds an acceptance of the depositor not yet matured. (See Morse on Banking, 2d edition, page 521.) It is obvious *a fortiori* that it cannot refuse to pay the same check after it has passed into the hands of an innocent purchaser for value without notice.

X.

Should the Court be of opinion that there is a federal question involved in this case, it would address its labor simply to the decision of that federal question and by no means enter upon inquiry as to the merits of the question of commercial law involved. In the case of Mathews v. Zane, 7 Wheaton, 164, a party claiming title to lands under an act of Congress brought a bill for a conveyance and stated equitable circumstances in aid of his title. The State Court dismissed his bill, and on appeal to this Court, on the ground of an alleged misconstruction of the act of Congress by the State Court, held that the Supreme Court could not consider the equities referred to, but was confined to an examination of the proper construction of the act of Congress and its effect on the plaintiff's title. In the case of Mills *et al.* v. Brown, the Court being of the opinion that the alleged federal questions were not necessarily involved in the decision of the State Court, declined, although both parties consented, to consider any other question involved in the judgment rendered below. In the case of Money *et al.* v. Porter, this Court uses the following language (see page 58):

"We have no right to review the decision of a State Court unless the complainant claims some right under the treaty or the act of Congress, and the decision of the

State Court has been against the right, title, or privilege specially set up by him, and even in that case the power of revision given in this Court extends no further than to the particular question thus raised and decided against the party. In the case of Gill v. Oliver's Executors, 11 Howard, 551, it is true that the opinion given in the State Court is not entirely free from some grounds of misconception, but if erroneous, arising it does wholly on the State laws, it is not competent for us under this writ of error to reverse it. We can reverse it only when wrong, and wrong, too, for deciding improperly against some claim under United States law or treaty."

XI.

Applying these legal principles to the facts in this case, the conclusions to which we would desire to lead this court are that—

First. There is no jurisdiction in this court.

Second. That if the court entertain jurisdiction, it can only decide whether sections 5073, 5128 and 5129 do, under the facts in this case, afford the plaintiff in error a defense to this action.

Third. That they do not, and the judgment must be affirmed.

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